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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 256.

THE ATLANTIC PROSPHATE COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN C. GRAFFLIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED AUGUST 16, 1882.

Section 21820

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1 THE UNITED STATES OF AMERICA, }
District of South Carolina, } *to wit:*

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1882, before the Honorable Hugh L. Bond and the Honorable George S. Bryan, judges of the said United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In the Circuit Court.

JOHN C. GRAFFLIN, a Citizen of the State of Maryland,
Plaintiff,

2 *against*

THE ATLANTIC PHOSPHATE COMPANY, a Corporation created under and by the laws of the State of South Carolina,
Defendant.

Be it remembered that heretofore, to wit, on the 22d day of September, in the year of our Lord one thousand eight hundred and eighty-one, came into court the plaintiff, John C. Grafflin, by his attorney, A. G. Magrath, and filed the following complaint, which complaint is in the words and tenor following:

Complaint.

The complaint of the plaintiff alleges:

1. That the plaintiff is a citizen of the State of Maryland, and is domiciled in and resides in the city of Baltimore.

2. That the defendant is a corporation created under and by the laws of the State of South Carolina, and doing business in the State of South Carolina.

3 For a first cause of action:

1. That the defendant is indebted to the plaintiff in the sum of two thousand seven hundred and ninety-two $\frac{60}{100}$ dollars, with interest thereon from the 24th day of February, A. D. 1881, at the rate of seven per centum per annum, the same being due to the plaintiff for a cargo of "kainit," sold and delivered by the plaintiff to the defendant on the 24th day of February, A. D. 1881, at the special instance and request of the defendant.

2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of two thousand and seven hundred and ninety-two $\frac{60}{100}$ dollars, and the interest thereon, or any part thereof, although often requested so to do.

For a second cause of action:

1. That the defendant is indebted to the plaintiff in the sum of three thousand three hundred and forty-seven $\frac{55}{100}$ dollars, with interest thereon at the rate of seven per centum per annum from the 3d day of March, A. D. 1881, the same being due the plaintiff
4 for a cargo of "kainit," sold and delivered by the plaintiff to the defendant on the 3d day of March, A. D. 1881, at the special instance and request of the defendant.

2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of three thousand three hundred and forty-seven $\frac{55}{100}$ dollars, and the interest thereon, or any part thereof, although often requested so to do.

For a third cause of action:

1. That the defendant is indebted to the plaintiff in the sum of one thousand seven hundred and forty-three $\frac{37}{100}$ dollars, with interest thereon at the rate of seven per centum per annum from the 15th day of March, A. D. 1881, the same being due the plaintiff for a cargo of "kainit," sold and delivered by the plaintiff to the defendant on the 15th day of March, A. D. 1881, at the special instance and request of the defendant.

2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of one thousand seven hundred and forty-three $\frac{37}{100}$ dollars, with interest thereon, or any part thereof, although often requested so to do.

5 For a fourth cause of action:

1. That the defendant is indebted to the plaintiff in the sum of five thousand and eighty-three $\frac{53}{100}$ dollars, with interest thereon at the rate of seven per centum per annum from the 16th day of March, A. D. 1881, the same being due the plaintiff for a cargo of "kainit," sold and delivered by the plaintiff to the defendant on the 16th day of March, A. D. 1881, at the special instance and request of the defendant.

2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of five thousand and eighty-three $\frac{53}{100}$ dollars, with the interest thereon, or any part thereof, although often requested so to do.

For a fifth cause of action:

1. That the defendant is indebted to the plaintiff in the sum of two thousand four hundred and eighty-three $\frac{37}{100}$ dollars, with interest thereon at the rate of seven per centum per annum from the 18th day of March, A. D. 1881, the same being due the plaintiff for a cargo of "kainit," sold and delivered by the plaintiff to the defendant on the 18th day of March, A. D. 1881, at the special instance and request of the defendant.

6 2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of two thousand four hundred and eighty-three $\frac{37}{100}$ dollars, with the interest thereon, or any part thereof, although often requested so to do.

For a further cause of action:

1. That the defendant is indebted to the plaintiff in the full and just sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, with interest at the rate of seven per centum per annum on two thousand seven hundred and ninety-two $\frac{60}{100}$ dollars thereof from the 24th day of February, A. D. 1881, on three thousand three hundred and forty-seven $\frac{55}{100}$ dollars thereof from the 3d day of March, A. D. 1881, on one thousand seven hundred and forty-three $\frac{37}{100}$ dollars thereof from the 15th day of March, A. D. 1881, on five thousand and eighty-three $\frac{53}{100}$ dollars thereof from the 16th day of March, A. D. 1881, and on two thousand four hundred and eighty-three $\frac{37}{100}$ dollars thereof from the 18th day of March, A. D. 1881, the said sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, and the interest thereon, being so much money due and owing by the defendant to the plaintiff for sundry cargoes of "kainit,"
7 sold and delivered by the plaintiff to the defendant between the 24th day of February, A. D. 1881, and the 18th day of March, A. D. 1881, both inclusive, as appears by a bill of particulars hereto annexed and made part of this complaint.

2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, with the interest thereon, or any part thereof, although often requested so to do.

For a further cause of action:

1. That the defendant is indebted to the plaintiff in the sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, with interest at the rate of seven per centum per annum on two thousand seven hundred and ninety-two $\frac{60}{100}$ dollars thereof from the 24th day of February, A. D. 1881, on three thousand three hundred and forty-seven $\frac{55}{100}$ dollars thereof from the 3d day of March, A. D. 1881, on one thousand seven hundred and forty-three $\frac{37}{100}$ dollars thereof from the 15th day of March, A. D. 1881, on five thousand and eighty-three $\frac{53}{100}$ dollars thereof from the 16th day of March, A. D. 1881, and on two thousand four hundred and eighty-three $\frac{37}{100}$ dol-
8 lars thereof from the 18th day of March, A. D. 1881, the said sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars and the interest thereon being so much money advanced, laid out, and expended by the plaintiff for the use of the defendant between the 24th day of February, A. D. 1881, and the 18th day of March, A. D. 1881, both inclusive, at the special instance and request of the defendant.

2. That the said defendant has wholly neglected and refused to pay to the plaintiff the said sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, and the interest thereon, or any part thereof, although often requested so to do.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, with interest at the rate of seven per centum per annum on two thousand seven hundred and ninety-two $\frac{60}{100}$ dollars thereof from

the 24th day of February, A. D. 1881, on three thousand three hundred and forty-seven $\frac{55}{100}$ dollars thereof from the 3d day of March, A. D. 1881, on one thousand seven hundred and forty-three
9 $\frac{37}{100}$ dollars thereof from the 15th day of March, A. D. 1881, on five thousand and eighty-three $\frac{53}{100}$ dollars thereof from the 16th day of March, A. D. 1881, and on two thousand four hundred and eighty-three $\frac{37}{100}$ dollars thereof from the 18th day of March, A. D. 1881, together with his costs and expenses.

A. G. MAGRATH, *Pl'tff's Att'y.*

STATE OF MARYLAND, —— *County:*

Personally appeared John C. Grafflin, who, being duly sworn, says: That the matters and things in the foregoing complaint set forth are true of his own knowledge, excepting such as are therein stated on information and belief, and as to those so stated he believes it to be true.

JOHN C. GRAFFLIN.

Sworn to before me this 12th day of September, A. D. 1881.

[SEAL.] G. ERRETT REARDON,
Commissioner for the State of South Carolina in the State of Maryland.

10 *Atlantic Phosphate Company, Charleston. S. C., in Account with John C. Grafflin.*

		Dr.
Feb'y 24, 1881.		
For a cargo of "Genuine Kainit," per ship "Texas," weighing 450 tons, @ $9.25 pr. ton, F. O. B., incl'd'g freight and insurance to Charleston, S. C., in bulk	4,162 50	
Less freight, at $\frac{1}{6}$ per ton, £281 5 0, @ 4.86 $\frac{65}{100}$	1,369 90	
		2,792 60
March 3.		
For a cargo of "Genuine Kainit," per ship "Ararat," weighing 500 ton, @ $9.25 pr. ton, F. O. B., including freight and insurance to Charleston, S. C., in bulk	4,625 00	
Freight, @ $\frac{1}{6}$ pr. ton £312 10 0		
Less am't advanced Capt. 50 0 0		
Actual am't to deduct freight, @ 4.86 $\frac{65}{100}$, £262 10 0.	1,277 45	
		3,347 55
March 15.		
For a cargo of "Genuine Kainit," per ship "Batavia," weighing 400 tons, @ $7.50 per ton, F. O. B., including freight and insurance to Charleston, S. C., in bulk	3,000 00	
Less 10 pr. ct. p'd by Winfield S. Duncan, of Balto.	40 00	
	2,960 00	

11	Less freight @ $\frac{1}{6}$ pr. ton, £250 0 0, @ 4.86$\frac{65}{100}$	1,216 63	
			1,743 37
	March 16.		
	For a cargo of "Genuine Kainit," per ship "Ledu," weighing 650 tons, @ $9.00 per ton, F. O. B., incl'd'g freight and insurance to Charleston, S. C., in bulk	5,850 00	
	Freight @ 9s. per ton £292 10 0		
	Less am't advanced Capt. 135 0 0		
	Actual am't to deduct for freight £157 10 0 @ 4.86$\frac{65}{100}$	766 47	
			5,083 53
	Mch. 18.		
	For a cargo of "Genuine Kainit," per ship "Torfueus," weighing 500 tons, @ $7.50 per ton, F. O. B., including freight and insurance to Charleston, S. C., in bulk	3,750 00	
	Less 10 per cent. p'd by Winfield S. Duncan, of Balto	50 00	
		3,700 00	
	Less freight at 10s. per ton, £250 0 0 @ 4.86$\frac{65}{100}$	1,216 63	
			2,483 37
			$15,450 42

12 *Summons.*

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

JOHN C. GRAFFLIN, a Citizen of the State of Maryland,
against
THE ATLANTIC PHOSPHATE COMPANY, a Corporation created under and by the laws of the State of South Carolina, Defendant.

To the Atlantic Phosphate Company, defendant in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscriber at his office, 74 Broad street, Charleston, S. C., on or before the rule day occurring twenty days next after the service of this summons on you, exclusive of the day of service.

13 If you fail to answer the complaint within the time aforesaid, the plaintiff will take judgment against you for the sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, with interest at the rate of seven per centum per annum on two thousand seven

hundred and ninety-two $\frac{60}{100}$ dollars thereof from the 24th day of February, A. D. 1881; on three thousand three hundred and forty-seven $\frac{55}{100}$ dollars thereof from the 3d day of March, A. D. 1881; on one thousand seven hundred and forty-three $\frac{37}{100}$ dollars thereof from the 15th day of March, A. D. 1881; on five thousand and eighty-three $\frac{53}{100}$ dollars thereof from the 16th day of March, A. D. 1881, and on two thousand four hundred and eighty-three $\frac{37}{100}$ dollars thereof from the 18th day of March, A. D. 1881, and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, at Charleston, the twenty-second day of September, anno Domini one thousand eight hundred and eighty-one, and in the one hundred and sixth year of the Sovereignty and Independence of the United States of America.

A. G. MAGRATH, *Pl'ff's Att'y*,

[SEAL.] J. E. HAGOOD, JR.,
D'p'ty C. C. C. U. S., Dist. S. C.

14 *Acceptance of Service.*

CHARLESTON, *Sept. 22d*, 1881.

Service accepted of copies of within summons and complaint.

JAMES CONNER, *Def'ts Att'y.*

And on the 10th day of February, A. D. 1882, came into court the defendant, The Atlantic Phosphate Company, by its attorney, James Conner, and filed the following answer, which answer is in the words and tenor following:

Answer.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

JOHN C. GRAFFLIN, a Citizen of the State of Maryland, Plaintiff,
against
THE ATLANTIC PHOSPHATE COMPANY, a Corporation created under and by the laws of the State of South Carolina, Defendants.

15 The defendants above named, answering the complaint herein—

I. 1st. Admit that the matters and things in paragraphs I and II of said complaint contained are true, substantially as therein stated.

2d. And defendants deny each and every other allegation in said complaint contained.

II. And for a first defence defendants allege—

3d. That on or about the 10 day of May, 1880, they purchased, through W. S. Dunan, of Baltimore, representing himself as agent of C. O. Radde, of Hamburg, 2,500 tons kainit, to be shipped between 1st August and 31st October, 1880, and delivered at their wharf, on Ashley river, at $7.40 per ton, including freight and insurance.

4th. That on 12 November, 1880, defendants purchased from same

parties 450 tons kainit, to be shipped immediately and delivered at their said wharf, at $9.25 per ton.

5th. That on 26 November, 1880, defendants purchased from same parties 500 tons kainit, to be shipped by 16 December, 1880, and delivered to them at same place and on same terms.

6th. That on 17 December, 1880, defendants purchased from same parties 600 tons kainit, to be shipped by ship Leda prior to
16 January 1st, 1881, and to be delivered by them to defendants, at their works on Ashley river, at $9.00 per ton.

7th. That said vendors did, in execution of said contract, ship several cargoes of kainit by the vessels Neptune, Jupiter, Torfacus, Texas, Ararat, Kong Oscar, Batavia, and Leda, and did send defendants the shipping documents therefor.

8th. And defendants did, under said contract for 2,500 tons, receive the cargoes of the Neptune and Jupiter, aggregating 1,080 tons, and paid for the same; and did subsequently receive the cargoes of the Torfacus, Texas, and Ararat, aggregating 1,450 tons, the contract price of which was $7.40 per ton.

9th. That the cargo shipped by the Kong Oscar was on the contract of November 12, and that said vessel was lost, and vendors have received the insurance therefor; that the cargo of the Batavia was on the contract of November 26, for 500 tons at $9.25, and that of the Leda was on the contract of December 16, for 600 tons at $9.00.

10th. That defendants duly performed all the conditions of the contracts on their part, and are (and have ever been) ready and willing to pay for said cargoes according to the contracts therefor, subject to the claims which they have for damages for the non-performance of said contract of 10 May for 2,500 tons by vendors.

11th. That the vendors did not perform the conditions of
17 the said contract on their part, but, on the contrary, did not ship the said cargoes within the time and in the manner specified in said contract, but shipped the same months thereafter, so that they did not arrive until the business was over for the year, when the goods were much depreciated in value.

12th. That by the breach of said contract and the delay aforesaid defendants sustained great loss and damage, to wit: Damage to the amount of $9,586\frac{82}{100}$; which said damages defendants claim to recoup and set-off against any amounts which may be due by them under the circumstances above set forth.

III. And for a second defence defendants allege—

13th. That they purchased the cargoes mentioned in said complaint at Hamburg, under the contract, and received the same under the circumstances set forth in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, above written, and were, from the time of shipment of said kainit, the true owners thereof.

14th. That the invoices for all of the cargoes shipped by Radde to defendants were in the name of W. S. Dunan, of Balimore, agent of Radde, through whom the said several contracts were
18 made. But on 25 January, 1881, said Dunan requested defendants to return his invoices and substitute similar invoices

in the name of J. C. Grafflin, and defendants did so. But defendants never made any new contract in regard to said cargoes of kainit, or any of them, with said J. C. Grafflin.

15th. That defendants have never received any notice of the assignment of said contract or cargoes to said Grafflin, and, on information and belief, deny the same, and allege that they were the owners of said cargoes when shipped.

16th. That if said Grafflin has advanced money on said cargoes, he did so subject to the rights of defendants under said contract.

17th. And defendants claim to recoup their loss and damage above mentioned.

IV. And for a third defence defendants allege—

18th. That they purchased the cargoes mentioned in said complaint under the contract, and received the same under the circumstances set forth in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14, above written.

19th. That the original invoices were changed under the circumstances set forth in paragraph 14.

19 20th. That the said Grafflin was conversant with the terms of said contract and the rights of defendants thereunder.

21st. That defendants never received any notice of any interest of said Grafflin till after the breach aforesaid.

22d. That defendants are informed and believe that said Grafflin claims some interest as assignee of said vendors, or of the bills of lading of said cargoes. But defendants allege that such claim is subject to the claims of defendants for damages, and depreciation set forth in paragraphs 11 and 12 above-written.

V. And for and by way of counter claim defendants allege—

I. That on the 10 day of May, 1880, they purchased, through W. S. Dunan, of Baltimore, representing himself as agent of C. O. Radde, of Hamburg, 2,500 tons kainit, to be shipped between 1st August and 31st October, 1880, and delivered to defendants at their wharf on Ashley river, at $7.40 per ton, including freight and insurance.

II. That said parties did, in execution of said contract, ship several cargoes of kainit by the vessels Neptune, Jupiter,
20 Torfacus, Texas, and Ararat, and did send the defendants the shipping documents therefor.

III. That the defendants did under the said contract receive the cargoes of the Neptune and Jupiter, and paid for the same. But the other cargoes, aggregating 1,450 tons, were not shipped until long after the stipulated time, and did not arrive until the spring of 1881, after the business was over for the year, and when the value of the goods was much depreciated.

IV. And defendants allege that the invoices for the said several cargoes were in the name of W. S. Dunan, through whom said contract was made, and that on 25 January, 1881, said Dunan requested defendants to return his invoices, and substituted therefor similar invoices in the name of John C. Grafflin.

V. By reason whereof said John C. Grafflin, as defendants are

informed, claims a right under the said contract as assignee of said vendors.

VI. And defendants further, on information and belief, allege that said John C. Grafflin, though claiming to be assignee of said vendors, was in truth the real principal in said contract.

21 VII. And defendants, on information and belief, allege that said John C. Grafflin had full knowledge of said contract, and of the rights of defendants thereunder.

VIII. And defendants allege that they duly performed all the conditions of said contract on their part.

IX. And defendants allege that said vendors failed to perform their contract to ship the said 2,500 tons of kainit before 31st October, 1880, and in the manner specified in said contract; by reason whereof, and of the default and breach of contract by their vendors, these defendants sustained loss and damage to the amount of nine thousand five hundred and eighty-six $\frac{82}{100}$ dollars.

Wherefore defendants demand judgment for the amount aforesaid, with interest thereon from the 1st day of October, A. D. 1881, and the costs of this action.

JAMES CONNER,
Defendants' Attorney.

22 STATE OF SOUTH CAROLINA, } *ss:*
County of Charleston, }

Before me personally appeared Francis S. Rodgers, who, being duly sworn, says: That he is treasurer of the Atlantic Phosphate Company, the defendants above named, and that the matters and things set forth in the above-written answer are true to his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true; and further saith not.

FRANCIS S. RODGERS.

Sworn to and subscribed before me, this tenth day of February, anno Dom. 1882.

[SEAL.] BENJAMIN C. WEBB,
Notary Public.

Acceptance of Service.

Service accepted.
10 Feb., 1882. A. G. MAGRATH.

23 And on the 10th day of April, A. D. 1882, came into court the plaintiff, John C. Grafflin, by his attorney, A. G. Magrath, and filed the following reply to counter-claim, which reply is in the words and tenor following:

Reply.

THE UNITED STATES OF AMERICA, *South Carolina District:*

JOHN C. GRAFFLIN, a Citizen of the State of Maryland,
vs.
THE ATLANTIC PHOSPHATE COMPANY, a Corporation by the law of So. Ca.

Plaintiff's reply to defendants' counter-claim.

The said John C. Grafflin, in reply to the counter-claim set up in the answer of the defendants, says:

First. That the sum of $9,586.82, set up as a counter-claim against the plaintiff, is so set up as a claim against C. O. Radde, who was not the owner of the kainit sold and delivered by the plaintiff, nor entitled to claim or receive the purchase-money from the
24 defendants for the same; but that the said kainit was the property of the plaintiff, as such sold & delivered to the defendants, & to be paid for by the defendants to the plaintiff.

Second. That the said sum of $9,586.82, now set up as a counter-claim in this case, is the same $9,586.82, which, in paragraph 12 of the first defence in the answer, is claimed as a set-off against the sum of $15,450.42 by the plaintiff in his complaint claimed to be due & owing to him by the defendants for the kainit sold & delivered by him to the defendants.

Third. That the sale of the said kainit, set forth in the said complaint, and the delivery thereof to the defendants, was sold & delivered to the defendants as the property of the plaintiff, and as such to be paid for by the defendants to the plaintiff without any claim against the sum due by the said defendants to the plaintiff for the said purchase, by way of set-off, discount, recoupment, counter-
25 claim, or otherwise.

Fourth. That the said defendants did receive directly from the plaintiff, and from no other person or persons, as the owner or owners thereof, the cargoes of kainit set forth in his complaint; and did bind themselves to pay to the plaintiff for the same the sums of money set forth in the said complaint.

Fifth. That if any invoices of the cargoes of kainit did ever come into the hands of the defendant from W. S. Dunan, they did not pass any right or title to them, to the kainit mentioned in the same; as the defendants did plainly show and admit when they surrendered the same, and received others in the name of the plaintiff, by which and because of which they did receive the said kainit as the property of the plaintiff, sold and delivered to them; and have since kept and disposed of the said kainit as their property. They, the defendants, well knowing that the said kanit was the property of the plaintiff; that he had paid for it, and that
26 it did not come into their possession from him as the owner of the same, except upon the payment to him of the amount therefor claimed in the complaint.

Sixth. That the defendants well knew that they were allowed to

have the possession, because of the faith reposed by the plaintiff in their payment for the ka-nit to him of the amount set forth in the complaint.

Seventh. The plaintiff denies that he had any information or belief that the defendants either had or claimed to have a right to damages of any kind, which they intended to set up against the payment to the plaintiff of the amount he claims to be due to him, or that they would attempt to set-off against the amount due to him for the ka-nit received by them as purchases from him as the owner and seller of the ka-nit, any claim they might have or make against C. O. Radde, or any other person or persons. But
27 as the defendants well knew and understood the said kainit was delivered to the defendants in good faith as the property of the plaintiff, and with reliance upon their promise and good faith, that they would pay him for the ka-nit which he delivered to them as his property, and they accepted and received the same as such, to be paid for by them to him.

Eighth. The plaintiff denies that he is or was the assignee of the contract set forth in the answer of the defendants, or that he was the principal in the contract between the defendants & C. O. Radde, or that he had any interest in the same, or liable for the failure or breach thereof, or that he ever occupied with the defendants any other relation than that of seller & buyer of the ka-nit set forth in the complaint, at the price understood and agreed to, to be paid by the defendants to him, & that without any claim for damages or otherwise, affecting the right of the plaintiff to receive the sum from the defendants set forth in the complaint to be due and owing & of right to be paid to the plaintiff by the defendant.

A. G. MAGRATH,
Plff's Att'y.

28 *Acceptance of Service.*

Service accepted.
Ap'l 10, 1882. JAS. CONNER.

And at the April term of the said court, begun and holden at Charleston aforesaid, on the first Monday in April, 1882, this case came up for trial before the following jury, to wit: S. Y, Tupper, foreman; C. O. Witte, A. W. Marshall, Daniel Ravenel, A. P. Holmes, T. D. Jervey, T. C. Boynton, Alexander McLoy, S. A. Durham, Charles Kerrison, L. J. Walker, and S. Wragg Simons.

The pleadings were read to the court and jury, and the following testimony was introduced by the plaintiffs and defendants, which testimony is in the words and tenor following:

Testimony in Behalf of Plaintiff.

J. C. GRAFFLIN:

29 Proves payment by him of 5 drafts drawn on him by Brown, Shipley & Co., of London, for the several cargoes of kainit in bills of lading, advanced on these cargoes, at the request of Mr.

Dunan. Had no interest in the cargoes until I paid for them. My object in making the advances was to assist Mr. Dunan in his business, knowing that he had not the means. The cargoes were the security I had for the liability. Knew nothing of any contract between Atlantic Co. or Pelzer, Rodgers & Co. and Dunan and Radde. Knew of the destination of the cargoes. My letter of instructions to Brown, Shipley & Co. directed the shipment to Charleston, to Pelzer, Rodgers & Co. Gave power of attorney to Pelzer, Rodgers & Co. to receive the cargoes. Did not draw on them. Did not make delivery conditional on their accepting draft. Would not have done so if they had been strangers. In these cargoes, brought out by Mr. Dunan for Mr. Radde, in which I acted as banker, I never waited acceptances, because I had perfect confidence in the
30 parties. I never supposed they would dispute the bills. Did not accompany the delivery by draft, because I had confidence in the parties. Never knew of any objection by Pelzer, Rodgers & Co. until settlement was asked.

Cross-examined:

Presented account through Mr. Dunan. Did not advise Pelzer, Rodgers & Co. that Dunan was my agent. I did not designate Mr. Dunan as my agent. The law must decide his position to me. Mr. Dunan conducted the correspondence with Pelzer, Rodgers & Co., sent invoices, and acted for me.

Q. He was then your agent?

A. Well, perhaps; I cannot say.

Q. Was he your agent?

A. He was my collector; he was to some extent my agent. Never notified Pelzer, Rodgers & Co. that Dunan was my agent, in full or in part. Never wrote Pelzer, Rodgers & Co. until after they had notified Dunan that they had a claim for damages.

31 Witness is shown letter; identifies it as his letter to Pelzer, Rodgers & Co. of date Ap'l 23, 1881. Letter refers to the cargoes in suit.

Q. In this letter you state that Mr. Dunan was your agent.

A. Only to collect.

Q. To realize draft and deliver cargoes?

A. Simply to collect money.

Q. Letter reads: "And Mr. Dunan, who then becomes my agent for the realization of the draft by my consent, proceeds to permit deliveries of the cargoes in hands of Mr. Radde without requiring cash before delivery."

A. Yes, as it is there; he was my agent in connection with these cargoes, but in no respect as to the sales; I knew nothing about these.

Q As there was no draft, what do you mean by realization of the draft?

A. Collection of the value invested in these cargoes; my invoices for each cargo as sent forward. Am not regular banker. I loaned my credit on commission of one per cent. on advances. That was
32 all my interest in these cargoes. I advanced to Mr. Radde

through Brown, Shipley & Co. Dunan paid me the one per cent. commission. Radde paid Brown, Shipley & Co. their commission. I gave Radde a credit with Brown, Shipley & Co. Radde drew on them and they drew on me. The documents came to me through Brown, Shipley & Co. I handed them over to Mr. Dunan to carry out his agreements. I knew that the cargoes were for Pelzer, Rodgers & Co. When credits went forward I knew the destination of the cargoes. I gave Brown, Shipley & Co. letter of instructions. My letters of instructions correspond with the bills of lading of these cargoes. They were to come to the Atlantic Phosphate Company. The bills of lading were made out in accordance with my letter of instructions to Brown, Shipley & Co. Wrote letter of instructions at request of Dunan.

Q. Did Atlantic Co. or Pelzer, Rodgers & Co. ever request you to sell them these cargoes?

33 A. Yes; by virtue of their accepting my documents. I had no correspondence with them with regard to sale of the cargoes. Only sold these cargoes to them through my advances on the cargoes. They never asked me to sell. They never asked me to advance. I became owner of the cargoes as soon as they were shipped from Hamburg.

Q. Radde never sold to you?

A. No.

Q. Nor you to the Atlantic?

A. Except as advancing as banker.

Q. You never advised Pelzer, Rodgers & Co. that you were the seller?

A. No. When the bills of lading came to me I endorsed them and delivered them to Dunan, who forwarded them to Pelzer, Rodgers & Co., with all other shipping documents. Dunan, at same time, also forwarded memorandum invoices in his own name for the cargoes. Afterwards invoices in my name were substituted for invoices in Dunan's name, as stated in letter of Dunan Jan'y 25.

I knew that the credit I gave were for these goods coming to

34 Pelzer, Rodgers & Co.

In reply:

I am the owner of the bills of lading. The bills of lading were delivered to Pelzer, Rodgers & Co. I did not send first invoices nor second; Dunan sent them. The first were sent back and the second sent in substitution. I advanced on the cargoes, and Pelzer, Rodgers & Co. received the cargoes under the authority I gave. I had no communication with Radde; Dunan was the agent of buyer and seller.

W. S. DUNAN: Reside in Baltimore; merchandise broker. Sold the five cargoes in question to Pelzer, Rodgers & Co., general agents Atlantic Phosphate Co. I was acting as agent of C. O. Radde, of Germany.

I printed circulars, identified as issued by witness, and sent to Pelzer, Rodgers & Co. constantly for years before 1880.

To expedite the business, I got Mr. Grafflin to make the

35 advance necessary to enable Radde to fill his contracts. I

paid the commission to Grafflin; Grafflin was protected by having the cargoes. Grafflin had all the documents for the cargoes.

The documents for cargoes were made to conform to letter of instructions for credit. Never had any correspondence with Pelzer, Rodgers & Co. as to credit for the cargoes. When they got the shipping documents they would see that the cargoes came forward on a credit. They came out in the name of Grafflin, because he furnished the credit. The documents came to Mr. Grafflin from Brown, Shipley & Co.; he delivered them to me, and I forwarded them to Pelzer, Rodgers & Co., at the request of Grafflin; forwarded them in advance of the arrival of the vessels, generally 16 to 20 days after they are dated. The documents comprised bills of lading, charter-party, consular invoices, on which cargo has to be entered in custom-house, certificate of analysis and of weight in Hamburg, and memorandum invoice.

36 Cross-examined:

Have been Radde's correspondent for a number of years. Had dealings for kainit with Pelzer, Rodgers & Co., as agents for Atlantic Co., previous to these transactions. In one instance, the first, they furnished the credit in London. In the others the credit was furnished by J. C. Grafflin & Co. In these transactions the documents came forward exactly as in this case—bills of lading and consular invoices in name of Grafflin & Co., who delivered them to me, and I forwarded them to Pelzer, Rodgers & Co., with power of att'y from Grafflin & Co. to enter them in custom-house, and memorandum invoices in my name, made out on my own bill-heads. Pelzer, Rodgers & Co. settled with me on my invoices, and I turned the money over to Grafflin & Co. In all these previous transactions Pelzer, Rodgers & Co. dealt with me. They did not communicate with Radde, to my knowledge.

Q. In these transactions, did you notify Pelzer, Rodgers &
37 Co. in any way that you were acting as agent for Grafflin?

A. I can't recollect. I may have asked them to remit the money to me for Grafflin.

Q. Did you ever notify them in these transactions that the cargoes were the property of Grafflin?

A. No. Their commercial education would instruct them, as the papers were in name of Grafflin, that the bills of lading were in Grafflin's name—told them that Grafflin had advanced on these cargoes. When the bills of lading for these cargoes were forwarded to Pelzer, Rodgers & Co. they were accompanied by invoices made out in my own name. I did not notify Pelzer, Rodgers & Co. that I was agent of Grafflin; did not notify them that Grafflin was interested in these cargoes other than by forwarding the documents. Never notified Pelzer, Rodgers & Co. that I ceased to act for Radde and had become agent for Grafflin. On Jan'y 25, 1881, I
38 asked them to return my invoices and substitute invoices in name of Grafflin. (Letter read.)

To the Court: Cargoes had not then arrived.

All the documents had arrived and had been forwarded to Pelzer,

Rodgers & Co. I got Grafflin to advance on these cargoes after each sale was made. He knew that the cargoes were coming to these parties. I got the advances under instructions from Mr. Radde.

Q. Did you deliver the shipping documents for these cargoes in pursuance of any contract between Grafflin and Pelzer, Rodgers & Co.?

A. No. No contract that I know of, except I supposed it was understood between all of us how the goods were coming.

In reply:

(Produces invoices.) These are the invoices which were returned when others were sent in my letter of 25th Jan'y. After sending the originals in my name I was in New York, and from con-
39 sultations had there concerning the best and proper mode of transacting such business, and before and without reference to this dispute, I became satisfied that I ought not to have sent invoices in my own name, and therefore substituted invoices in Grafflin's name. I had no difficulty in view when I substituted the invoices.

Documentary Evidence Introduced by Plaintiff.

Declaration to be made by the purchaser or owner, where merchandise has been actually purchased.

Consulate of the United States of America at Hamburg.

I, Carl Otto Radde, do solemnly and truly declare that I am the owner of the goods, wares, or merchandise in the annexed invoice mentioned and described; that the said invoice is in all respects true; that it contains a true and full statement of the time when and the place where the goods, wares, and merchandise therein men-
tioned and which are subject to any ad valorem rate of duty,
40 to any duty regulated or directed by law to be estimated or based upon the value of the square yard or any other specified quantity or parcel, were purchased, and the actual cost and quantity thereof, and of all charges thereon; that no discounts, bounties, or drawbacks are contained in said invoice, but such as have been actually allowed thereon; that the currency in which said invoice is made out is the currency which was actually paid or is to be paid for the said goods, wares, and merchandise, and that no different invoice has been or will be furnished to any one. I further declare that it is intended to make entry of said goods, wares, and merchandise mentioned in said invoice at the port of Charleston, S. C., in the United States of America.

CARL OTTO RADDE,
Of the firm of Carl Otto Radde.

Dated at Hamburg, this 24th day of November, 1880.

(Signed in triplicate.)

[Endorsed:] United States consulate, Hamburg. James M. Wilson, consul. No.—. Date, 24th November, 1880. Invoiced by Carl Otto Radde, Hamburg. Consigned to J. C. Grafflin, Charleston, S. C., per Texas. Value, mark, 11,655.

41 I, James M. Wilson, consul of the United States at Hamburg, do hereby certify that at Hamburg, on the day and year aforesaid, the annexed invoice, numbered 174, in which are mentioned and described certain manure salt, amounting, with the charges thereon, to the gross sum of mark 11,655.00, was produced to me by Mr. Radde, in person, the owner of the goods, wares, and merchandise therein mentioned, who thereupon declared, in writing, in my presence, that it is intended to make entry of said goods, wares, and merchandise at the port of Charleston, S. C., in the United States of America.

I do further certify that I am satisfied that the person making the said declaration is the person he represents himself to be, and that, so far as I have the means of knowing, the actual market values or wholesale prices of the goods, wares, and merchandise described in the said invoice, in the principal markets of the country and at the time of exportation, are correct and true.

Rec'd $2.50. No. 174.

42 Witness my hand and seal of office, at Hamburg.

[SEAL.] JAMES M. WILSON,
Consul of the United States of America.

Hamburg, 24 November, 1880.

No. 36. J. C. Grafflin, Esq. Baltimore, D'n.

John C. Grafflin, a cargo of genuine kainit, (manure salt,) a substance used expressly for manure, shipped per Texas, Capt. H. Kruse, to Charleston, S. C., weighing 450 tons, @ M. 25.90 per ton, F. O. C.

Here inlc. all shipping charges	M. 11,655 M.
Commissions, 2½ per cent.	291 38
	11,946 38

[SEAL.] CARL OTTO RADDE.

CUSTOM-HOUSE, BALTIMORE.

Verified this 16th day of Dec., 1880. Amount of invoice, M. 11,655.

A. M. M'CONNOD, *Collector.*

PORT OF BALT.

Passed. Dec. 16, 1880.

C. F. HANNA, *Cashier of Customs.*

Value eleven thousand nine hundred and forty-six $\frac{38}{100}$ marks, including charges and commissions, 2½ per cent.

Examined Feb'y 26, 1881. Rate of value correct.

J. WESLEY SMITH, *Insp'r & Ex'r.*

I certify that this invoice was presented to me on entry No. 90,

Ger. B'k "Texas," from Hamburg, custom-house, Charleston, this 24th day of Feb'y, 1881.

Examined on wharf.

E. S. JENNISON, *Deputy Collector.*

Approved: C. H. BALDWIN, *Coll. & Act'g App'r.*

43 *Cat. No.* 587.

Owners' oath to entry of merchandise actually purchased.

I, John C. Grafflin, do solemnly and truly swear (or affirm) that the entry now delivered by me to the collector of Baltimore, Md., contains a just and true account of all the goods, wares, and merchandise imported by or consigned to J. C. Grafflin, Charleston, in the bark "Texas," whereof H. Kruse is master, from Hamburg; that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares, and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up, and packing, and no other discount, drawback, or bounty but such as has been actually allowed on the same; that I do not know nor believe in the existence of any invoice or bill of lading other than those now produced by me; that they are in the state in which I actually received them; and that the said invoice and declaration thereon are in all respects true, and were made by the person by whom the same purport
44 to have been made; and I do further solemnly and truly swear (or affirm) that I have not in the said entry or invoice concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on said goods, wares, and merchandise; and that if at any time hereafter I discover any error in the said invoice, or in the account now produced of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district.

JOHN C. GRAFFLIN.

PORT OF BALTIMORE, MD.

Sworn to, this 16th day of December, 188(2), before me.

W. M. McCIMAS,
D. Collector.

(Ed. 5-24-'80, 3000.)

PORT OF BALTO.

Passed Dec. 16, 1880. C. F. HANNA, *Cashier of Customs.*

45 *Import Entry No.* 38.

Entry of merchandise imported by John C. Grafflin in the German barque "Texas," whereof H. Kruse is master, from Hamburg, Germany, Feb. 24, 1881.

Marks, numbers, none. In bulk. Packages and contents, one cargo natural or genuine kainit fertilizing salts; quantity, 450 tons,

1,008,000 lbs.; prime cost, M. 11,655:00; charges and comm's, M. 29,138; total value, M. 11,946.38; value dollars, $2,843.24; free, $2,843. Invoice No. 36: Estimated duty, $2,843.00 @ free; bond, 40c.; oath & cert., 40c.; p'm't, 20c. $1.00. W. E. M., E. C. Liquidated without charge May 23, 1881. W. H. B., G. C. Charleston, S. C., Feb. 24th, 1881. John C. Grafflin, per Thos. S. Inglesby, att'y. Fees p'd Feb. 24, '81. E. S. J., d'y coll.

DISTRICT AND PORT OF CHARLESTON, S. C.:

Consignee's, Importer's, or Agent's Oath.

I, T. S. Inglesby, att'y for Jno. C. Grafflin, do solemnly and truly swear that the invoice and bill of lading now presented by me to the collector of Charleston are the true and only invoice and bill of lading by me received of all the goods, wares, and merchan-
46 dise imported in the Ger. barque "Texas," whereof H. Kruse is master, from Hamburg, Germany, for account of any person whomsoever, for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise according to the said invoice and bill of lading; that nothing has been, on my part, nor to my knowledge on the part of any other person, concealed or suppressed whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive
47 any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear to the best of my knowledge and belief that J. C. Grafflin — owners of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost or fair market value at Hamburg, Germany, of the said goods, wares, and merchandise, all charges thereon, and no other or different discount, bounty, or drawback, but such as has been actually allowed on the same.

THOS. S. INGLESBY, *Att'y.*

Sworn to this 24th day of Feb'y, 1881, before me.

E. S. JENNISON,
Dep'ty Collector.

Owner's Oath.

I, ——, do solemnly and truly——

48 400 *Tons Genuine Kainit.*

BALTIMORE, *January 15th*, 1881.

Atlantic Phosphate Co., Charleston, S. C., bought of John C. Grafflin:

A cargo of genuine kanit, shipped per "Batavia," Capt. G. Linde, to Charleston, S. C., weighing 400 tons, sold @ $7.50 per ton f. o. b. at Hamburg, incl'd'g freight and insurance to Charleston	$3,000 00
Less 10 c't per ton allowed	40 00
	$2,960 00
Deduct freight @ 12–6 per ton	1,175 82
	$1,784 18

Insurance policy for 8,200 marks covering this shipment is held by Mess. Brown, Shipley & Co., London, Eng., bankers, for benefit of purchasers.

Shipped in good order and well conditioned by Carl Otto Radde, in and upon the ship "Batavia," Master G. Linde, now lying in the port of Hamburg, and bound for Charleston, S. C., four hundred tons genuine kainit (manure salt), to be delivered in the like good order and condition at the said port of Charleston, S. C., at the At-
49 lantic Phosphate Co.'s wharf on Ashley river, above the city, all and every dangers and accidents of the seas [or] of fire, of what nature or kind soever excepted unto Mr. J. C. Grafflin or his assigns, he or they paying freight for the same, and all other conditions as per charter party.

In witness whereof, the master of the said ship has signed two bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

HAMBURG, *the 30th Dec'ber*, 1880.

Qualitat Maafs, Gewicht & Jnhalt unbekannt; frei von essepädi-

To be inserted at end of folio 49.

It is admitted that all the invoices of the cargoes were put in evidence, and it is agreed to amend the Bill of Exceptions by inserting therein the words, "The sum total of the invoices is $15,450.42." It is further agreed that these words may be inserted, or taken to be inserted, in the transcript and in all printed copies at the end of folio 49.

1,008,000 lbs.; prime cost, M. 11,655.00; charges and comm's, M. 29,138; total value, M. 11,946.38; value dollars, $2,843.24; free, $2,843. Invoice No. 36: Estimated duty, $2,843.00 @ free; bond, 40c.; oath & cert., 40c.; p'm't, 20c. $1.00. W. E. M., E. C. Liquidated without charge May 23, 1881. W. H. B., G. C. Charleston, S. C., Feb. 24th, 1881. John C. Grafflin, per Thos. S. Inglesby, att'y. Fees p'd Feb. 24, '81. E. S. J., d'y coll.

DISTRICT AND PORT OF CHARLESTON, S. C.:

Consignee's, Importer's, or Agent's Oath.

I, T. S. Inglesby, att'y for Jno. C. Grafflin, do solemnly and truly swear that the invoice and bill of lading now presented by me to the collector of Charleston are the true and only invoice and bill of lading by me received of all the goods, wares, and merchan-
46 dise imported in the Ger. barque "Texas," whereof H. Kruse is master, from Hamburg, Germany, for account of any person whomsoever, for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise according to the said invoice and bill of lading; that nothing has been, on my part, nor to my knowledge on the part of any other person, concealed or suppressed whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; and that if at any time hereafter I discover any error in the said invoice, or in the account now ren-
dered of the said goods, wares, and merchandise, or receive
47 any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear to the best of my knowledge and belief that J. C. Grafflin — owners of the goods, wares, and merchandise

48 *400 Tons Genuine Kainit.*

BALTIMORE, *January 15th*, 1881.

Atlantic Phosphate Co., Charleston, S. C., bought of John C. Grafflin:

A cargo of genuine kanit, shipped per "Batavia," Capt. G. Linde, to Charleston, S. C., weighing 400 tons, sold @ $7.50 per ton f. o. b. at Hamburg, incl'd'g freight and insurance to Charleston	$3,000 00
Less 10 c't per ton allowed	40 00
	$2,960 00
Deduct freight @ 12–6 per ton	1,175 82
	$1,784 18

Insurance policy for 8,200 marks covering this shipment is held by Mess. Brown, Shipley & Co., London, Eng., bankers, for benefit of purchasers.

Shipped in good order and well conditioned by Carl Otto Radde, in and upon the ship "Batavia," Master G. Linde, now lying in the port of Hamburg, and bound for Charleston, S. C., four hundred tons genuine kainit (manure salt), to be delivered in the like good order and condition at the said port of Charleston, S. C., at the At-
49 lantic Phosphate Co.'s wharf on Ashley river, above the city, all and every dangers and accidents of the seas [or] of fire, of what nature or kind soever excepted unto Mr. J. C. Grafflin or his assigns, he or they paying freight for the same, and all other conditions as per charter party.

In witness whereof, the master of the said ship has signed two bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

HAMBURG, *the 30th Dec'ber*, 1880.

Qúalitat Maafs, Gewicht & Jnhalt unbekannt; frei von essepädigung Bouch & Lokage.

G. LINDE. 12.

The bills of lading, invoices, consular, and memorandum invoices, and all shipping documents for the other cargoes were in all respects the same as those here set out.

50 *Power of Attorney.*

Thomas M. Norris, custom-house broker and average adjuster, opposite custom-house, Baltimore, Md.

Know all men by these presents that I, John C. Grafflin, of Baltimore city, State of Maryland, doing business in said city at No. — South St., have made, ordained, nominated, constituted and appointed, and hereby do make, ordain, nominate, constitute and appoint, and in my place and stead put and depute Francis J. Pel-

zer, Francis S. Rodgers, W. J. Muckenfuss, Thos. I. Ingelsby and Francis J. Pelzer, Jr., composing the firm of Pelzer, Rodgers & Co., of Charleston, South Carolina, or either of them, my true and lawful attorneys for me, and in my name, place, and stead to enter in due form of law at custom-house, Charleston, in the United States of America, all goods, wares, and merchandise which have been imported, or may hereafter be imported, by me, or which have arrived, consigned, or may hereafter arrive consigned to me, or in which I am or may be interested or concerned as principal or otherwise.

51 And for me, and in my name, place, and stead to sign, seal, execute, and deliver all and every bond and bonds which may be required to secure the duties thereon, or for the transportation or exportation of the same; or any other bond or bonds required by the revenue laws or the regulations of the Treasury Department of the United States, or the collector of the customs of the district of Charleston, S. C., relative to any such merchandise; or which may be necessary to obtain the debenture and debentures upon such of the said goods, wares, and merchandise, as may be exported for me or on my account.

To have, take, and receive all debenture certificates to be issued thereupon for me, and in my name, place, and stead to endorse, assign, and transfer the same; or to have, take, and receive the moneys due and to grow due thereon; and generally, as my attorneys, to do, transact, and perform all custom-house business of what kind soever, in which I am or may be interested

52 or concerned, as fully and effectually to all intents and purposes, as I, if present there in person, could do; also to set my seal to any instrument which may be necessary in the premises, and the same to acknowledge for me to be my deed; and generally, to do and perform all things relating to the premises which I could lawfully do if personally present, and as fully and effectually to every intent and purpose, although the same should seem to require more precise or special authority than is herein expressed. And especially authorizing and empowering my said attorney, for me and in my name, place, and stead, to sign, seal, execute, and deliver all bonds of indemnity and other specialties, and also all other documents which may be necessary for effecting the premises, hereby ratifying and confirming all that my said attorney may lawfully do by virtue hereof.

And it is hereby declared and understood that this power shall be and remain in full force and virtue until revoked by written notice given to the collector.

53 In witness whereof I have hereunto set my hand and affixed my seal, this thirty-first pay of August, in the year of our Lord one thousand eight hundred and eighty.

(S'g'd) JOHN C. GRAFFLIN. [SEAL.]

Signed, sealed, and delivered in the presence of—
WM. H. MASSON,
N. EMORY PLUMMER.

Proved by Wm. H. Masson, 31 August, 1880.

BALTIMORE, *Ap'l 23rd*, 1881.

Mess. PELZER, RODGERS & Co., *Charleston, S. C.*

GENTLEMEN: Mr. W. S. Dunan has handed to me some correspondence between you and him in reference to the cargoes of the Torfaens, Texas, Ararat, Batavia, and Leda, recently delivered to you, or now under way for your port.

I confess that I would be much concerned at the demands with which your part of the correspondence closes, if I thought that you made them, having in view my connection with the cargoes.
54 You must let me remind you that however just may be your complaints against Mr. Radde, he has not a dollar of interest in the cargoes. I do not assume to adjudicate the questions that exist between you and Mr. Radde, and I have no right to assume that complaints would be made by a house as respectable as yourselves, without some foundation, substantial enough in your honest opinion. But as you must clearly perceive those are questions between other parties with whom I cannot deal theoretically, and which, regarded practically, do not affect my interest in the cargoes.

For the convenience of the trade, and at such a slight profit to myself as to make it undesirable from a business point of view, I have endeavored to be the medium of transactions between the seller in Germany and the buyer on this side, by furnishing the credit without which the transactions would have been much more difficult, if not impossible. I have done this by purchasing Mr. Radde's
55 whole interest in his cargoes, as in every instance he draws immediately upon shipment for the full value, less the freight, and Mr. Dunan, who then becomes my agent for the realization of the draft by my consent, proceeds to permit deliveries of the cargoes in honor of Mr. Radde without requiring cash before delivery. I take Radde's cargoes off his shoulders and then honor his sale in such manner as to give the purchasers the greatest ease in getting their goods. You must see then that the bare necessity of continual consideration by me of such questions as late shipments, demurrage, and substitution by Mr. Radde of one cargo for another, even though the difficulties be eventually smoothed, would force me to withdraw the credit upon which the transactions are based. They are questions between Mr. Radde and yourselves alone, and it would be most destruction if I were called upon to make allowance by reason of them against the actual face of my disbursements
56 for the bills of lading. This is true in regard to all the points of grievance. Take for instance your desire that the cargo of the "Texas" should be taken by you at 7.40, while this might be a reasonable enough wish if the cargo belonged to Mr. Radde, the difficulty is that I have actually paid 9.25 for it, and the vessel that contained your 7.40 (King Oscar) was lost. I place these matters frankly and in the most friendly spirit before you, having little doubt that when you remember the relation that I sustain to the cargoes, you will be the last men to endeavor to enforce your demands against Mr. Radde at my expense. I regret exceedingly that you have had trouble, and have no doubt that Mr. Dunan, who

contracted with you on Radde's behalf, will use every effort to secure you satisfaction. That is his interest, as I am sure that it will be his pleasure. I had a similar difficulty in Savannah with Mr. P. M. De Leon, and was forced to protect my interests then by litiga-
57 tion, but I had no opportunity to show Mr. De Leon in advance the injury that his course would do to the trade, nor indeed do I stand in the same familiar relations with him that I do with you.

I sincerely trust that you will meet me in the spirit in which I address you, and that maintaining whatever right you may have against Mr. Radde, you will close up the transactions, so far as I am concerned, for the face of the cargoes, less the freights.

With high regard, I remain yours truly,

(S'g'd) JOHN C. GRAFFLIN.

BALTIMORE, *May* 18*th*, 1881.

Mess. PELZER, RODGERS & Co.,
Atlantic Phosphate Co., Charleston, S. C.

GENTLEMEN: I am in receipt of your favor of 10th inst., and am very much surprised at its contents, and your position towards me. Not only was it unexpected by me that you should endeavor
58 to hold my property liable for your claims against another, but there is a tone of anger and impatience pervading the whole letter that is entirely unwarranted by my letter to you and by my endeavor to protect myself from loss in a matter in which I am advised that I am in no way chargeable. My sin against you is that I have, in the first place, enabled an exporter to contract with you for goods from Germany, without hesitation, and in the second place, have treated you as personsl friends, and turned over the goods without demanding payment on delivery. Referring to your letter, permit me first to point out that you have no right to construe my language as meaning that your claim had foundation only in your honest opinion. I have a very decided opinion as to your rights in this matter, but I expressly disclaimed to adjudicate any such question. As latter merits of the matter between you & myself, I have carefully re-read my letter to you for anything that would authorize you to infer an admission that I have taken
59 Mr. Radde's place in his contract. I would hesitate to admit it, if such were the case; but it is not the fact. Where such violent distortion of one's language is made, it seems almost useless to point out that what I did say, and that the fact is that I purchased Mr. Radde's whole interest in his cargoes, and not in his contracts. If your counsel is of any fairness, he will tell you frankly that I could not have taken Radde's place in his contracts with you without your consent; that in buying the cargoes, by taking an assignment of the B. L., I did not buy or assume the contract; that I could have sold the cargo to any one that I pleased, leaving you to your remedy against Mr. Radde for breach; and that I could have detained the cargoes until payment by you on delivery. And now, because I have not sold the cargoes to others, but have deliv-

ered them without payment, is it possible that you will hold that I have injured myself by my confidence in you? I am so unwilling that you should assume the position
60 indicated by your last letter, that at the risk of being tedious, I will put another case to you: Suppose that a B. L. for cotton, with draft attached, had come into your hands as a banker, by discount, would you deliver the cotton until the draft was accepted? Surely not. And, if upon the payment of the draft and delivery of the cotton, it did not come up to sample, did you ever hear of the buyer who paid the draft going upon the bankers for reclamation upon the ground that he had assumed the seller's contract of sale? But suppose that for the convenience of the buyers, or out of friendly relations, you let the cotton go before acceptance or payment of draft, would you not be surprised at the buyer's refusal to pay the draft, after he had gotten the cotton, on the ground that it was not up to sample, or that it came too late?

These things are so clear to me that I cannot forbear mentioning them, in hope that you will see the want of fairness that
61 would be apparent in an acceptance of my cargoes without payment, and in remitting me to litigation.

I must decline to arbitrate a matter like this, and trusting that you will reconsider your last letter, remain—

Yours, very truly,

(S'g'd) JOHN C. GRAFFLIN.

Testimony in Behalf of Defendant.

Deputy Collector JENNISON:

Prior to these cargoes in dispute, other cargoes came forward to Atlantic Co. with shipping documents in all respects similar to these cargoes, except that they were in name of Grafflin & Co., instead of J. C. Grafflin.

A similar power of att'y from Grafflin & Co. was filed in custom-house, and owner's oath by Grafflin, and consignee's oath by Inglesby, exactly as in the case of these cargoes in dispute.

Cross-examination waived.

62 F. S. RODGERS:

Partner in Pelzer, Rodgers & Co. Are purchasers of kainit. Have had previous transactions with Dunan; Dunan represented Radde, of Germany. Previous cargoes came out exactly as these did, except on our first transaction, when we furnished bankers credit. In none of our previous transactions, nor in this, have we ever had any correspondence with Radde; dealt only with Dunan; dealt with him as agent of Radde. Never had any correspondence or dealing with Grafflin at any time in regard to these cargoes; never knew Grafflin as seller of these cargoes to the Atlantic Co. Never applied to Grafflin to sell, and never knew him as owner of these cargoes; never had any correspondence with Grafflin until after the difficulty arose in regard to these cargoes. Received the cargoes

of the Leda, Texas, Ararat, Batavia, Torfacus; received them under a contract made with Dunan, as agent of Radde, under his letter of Ap'l 29, 1880, and our reply of May 10.

63 Letters of April 29 and May 10 read.

The payment was to be cash on delivery at our works. We did not authorize Radde to draw on us, and would not have consented to such an arrangement. There were three other contracts made afterwards; terms of all the same, but price different.

Under this contract of 2,500 tons two cargoes were delivered—the Jupiter and the Neptune, 1,080 tons.

The bills [of] lading for these cargoes were in name of Grafflin, also the consular invoices. There was also power of att'y from Grafflin to enter them at custom-house; also memorandum invoices in name of Dunan on his bill-heads. We remitted to him for them, and he receipted in his name for the payment; did not receipt as agent. The other 1,400 tons of the 2,500 came out by the three first vessels which sailed—Texas, Torfacus, and Ararat.

The bills of lading and consular invoices for these cargoes were in Grafflin's name; the memorandum invoices in name of Dunan;
64 received all the documents from Dunan. The power of attorney had to be from the party in whose name the bill of lading was.

Q. Did Dunan ever give you any notice that Radde had ceased to be and Grafflin had become the owner of these cargoes?

A. None.

Q. Did he ever notify you that Grafflin had any interest in these cargoes?

A. Not a word until after the difficulty. On January 25, 1881, when Dunan asked for the substitution of invoices, we had all the shipping documents and bills of lading and power of att'y to enter the cargoes. We were not advised then that any one but Radde had an interest in the cargoes. Nothing was said except as stated in letter of January 25th. We paid for the first two cargoes of the 2,500 tons contract to Dunan. We were never requested by Mr. Grafflin to pay him for any of these cargoes. We had always sent checks to Dunan. We were now asked to send checks
65 through Dunan for Grafflin; supposed there was some arrangement between them. The contract of May 10 was not carried out; complained to Dunan.

Letter of May 5, 1881, read, and letters of Dunan.

Up to the last letter which Dunan wrote nothing was said of Grafflin having any interest in these cargoes, or anything to do with them. I knew nothing of any advances made by Grafflin. The cargoes were all insured for purchaser's account. Insurance was not made by us. By the terms of contract seller was to insure. The insurance was effected across the water.

Cross-examined:

The bills [of] lading were in name of Grafflin; the memorandum invoices in name of Dunan.

Q. You had Grafflin's power of attorney?
A. Yes; to enter goods at custom-house.
Q. You entered the cargoes at his request?
A. No, sir.
66 Q. Until Grafflin endorsed the bill of lading the property belonged to him, did it not?
A. No, sir; when he transfers the bill of lading he parts with all control.
Q. When that cargo arrived here it was controlled by bill of lading?
A. Yes.
Q. That indicated Grafflin as owner?
A. No, I had bill of lading; got it from Dunan; Grafflin endorsed and delivered it to Dunan.
Q. You got the goods by authority of Grafflin, who was special owner of the goods under the bill of lading?
A. I got the cargoes upon bills of lading I had in my possession; the cargo came here under a contract made by us with Dunan.
Q. It came to J. C. Grafflin?
A. To J. C. Grafflin or his assigns.
Q. When J. C. Grafflin gave you authority to receive the goods, he had property in the goods, having made advances?
A. Did not know Mr. Grafflin in the transaction; I received the goods under contract made with Dunan—with Radde.
67 In reply:
All bills of lading expressed that cargoes were to be delivered to the Atlantic Co. at their wharves.
Witness entering upon proof in detail of damages, it was admitted that the damages proved for breach of contract with Radde amounted to $10,000, and examination closed.

T. S. Inglesby:

Partner of Pelzer, Rodgers & Co.; entered the cargoes at the custom house; knew nothing of the transactions between the firm and Dunan or Radde.
Entered the goods according to the information contained on the face of the papers.

Documentary Evidence Introduced by Defendants.

Letter of W. S. Dunan to Pelzer, Rodgers & Co.; date 29 April, 1880:

"Radde cables sell Atlantic 2,500 tons best quality Eagle Mine genuine raw kainit, guaranteed to test not below 24 per cent.
68 sulphate of potash by the German chemist, Dr. Ulex, to be shipped during the summer and fall months—say from August to October inclusive—for $7.50 per ton of 2,240 lbs. in taking Hamburg weights. The kainit to be delivered at your Atlantic Phosphate Company's wharf, Ashley river, port of Charleston, S. C. The price of $7.50 per ton includes cost, freight, and insurance to your wharf.

From the price, as the quantity is large, I will rebate 10 cents per ton. Terms of payment, cash on delivery of each cargo." * * *

Belzer, Rodgers & Co. to Dunan, May 10, 1880:

"We will take 2,500 tons best kainit, as described by you, to test not less than 24 per cent. sulphate of potash, to be delivered at our wharf on Ashley river, at seven dollars $\frac{50}{100}$ per ton of 2,240 lbs." * * *

BALTIMORE, *Jan'y 25th*, 1881.

Atlantic Phosphate Co., Charleston, S. C.

69 GENTLEMEN: I wish to withdraw all my invoices sent you, with the documents, for these cargoes, and substitute instead the enclosed invoices from Mr. John C. Grafflin, as all these cargoes come out in his name, and you will please return to me my invoices by return mail. In remitting for these cargoes please remit in name of John C. Grafflin, through me. In the future I will always furnish invoice in favour of name in which the cargo comes forward.

I enclose you herewith Mr. John C. Grafflin's invoices for the cargoes which are now coming forward, and for which you have the documents.

Yours, very truly, WINFIELD S. DUNAN,
Per MINER.

Dunan to Pelzer, Rodgers & Co., March 7, 1881:

"It pains me very much to note the great embarrassment you are subjected to on account of the long delay in arrival of your cargoes. * * * I secured a banker's credit here so as to enable him to pay cash and fulfill the contract."

70 Same to same, April 2, 1881:

"But while acting only in the capacity of salesman for Mr. Radde I can show that, when I saw there was a probability of Mr. Radde's failing in his contract with you for the want of immediate funds, I solicited Mr. Grafflin to make a banker's credit with Brown, Shipley & Co., of London, for which I paid said banker's charges out of my commissions, and then the kainit came forward, and as the documents were received they were mailed promptly to you, as per Mr. Grafflin's instructions." * * *

"I am very sorry, indeed, for the delays, annoyances, and losses that may have been incurred, and any allowance I must make I want to make to you direct, as it has to come out of my own pocket. I cannot fall back on Radde, because he has nothing out of which he can repay me."

To a letter of Pelzer, Rodgers & Co. to Dunan, of April 8, 1881, claiming and specifying damages sustained, Dunan, under
71 date of April 14, writes:

"Your favor of 8th inst. came duly to hand and was carefully noted. The contents appear to me to be of such an extraordinary nature that I have decided to consult older and more experienced

heads than my own before venturing a reply, and for this purpose am waiting the return of a couple of gentlemen now absent from the city, but will shortly give the letter my prompt and most careful respects.

"Yours, v'y truly, WINFIELD S. DUNAN.

Atlantic Phosphate Company of Charleston, S. C.

Directors: Francis J. Pelzer, president; Francis S. Rodgers, treasurer; Wm. P. Hall, L. D. De Saussure, J. B. E. Sloan, Wm. Lebby.

Pelzer, Rodgers & Co., general agents.

CHARLESTON, S. C., *May* 10, 1881.

Mr. JOHN C. GRAFFLIN, *Balto.*

72 DEAR SIR: Your favor of 23rd April came duly to hand and its contents have had our careful consideration. Your simple connection with the cargoes was no part of the cause which led to our claim for damages; but our claim was made because we had sustained heavy loss by the contract being improperly carried out, and we necessarily had to look for the payment of same from the parties alone who claimed the purchase-money, which we deeply regret should have been you. You say: "I have no right to assume that complaints would be made by a house as respectable as yourselves without some foundation, substantial enough in your honest opinion." We presume from your letter you have seen the correspondence, and hence must construe the above language as meaning our complaints have foundation only in our honest opinion.

73 We beg to say in this respect that the whole manner of the contract being executed has been bad, and we have been enabled so far to get no satisfaction from any one: but it is insisted upon by all parties that we must bear the whole loss incurred, and that, notwithstanding you admit having taken Radde's place, we must pay all you claim and submit to all the loss. This is certainly a very one-sided way of settling an improperly executed contract; it may suit you, but we cannot submit to it.

We contend that any disinterested party will be forced to admit that the whole correspondence shows we have been badly treated, and we are quietly told to go to Mr. Radde for damages, who, you say, "has not a dollar of interest in the cargoes." We must go for damages to the party alone who has this interest.

It was no favor to us to buy the K. from Mr. Dunan, as we could have bought elsewhere, and to-day we are besieged on all sides to buy our next year's supply, to be paid for when we receive it.

74 If language means anything, your whole letter admits the fact that you voluntarily exchanged places with Mr. Radde, and that then Mr. Dunan occupied the same position to you as he did at first to Mr. Radde. You cannot expect, certainly, to take a contract from another and only carry out what portion of same that you deem to your interest, and leave important parts not carried out, and at the same time expect the other party to carry out

the whole of his side, and have no redress for wrongs done in the matter.

You say: "Mr. Radde—he has not a dollar of interest in the cargoes." I have done this by purchasing Mr. Radde's whole interest in his cargoes;" and further on you admit Mr. Dunan then becomes your agent. From this we can only arrive at one conclusion, which is, that you voluntarily take whatever position Mr. Radde occupied in the contracts, and that Mr. Dunan is then your agent for the carrying out of the contract made with us, and hence
75 you are bound to carry out the contract as agreed upon. Failing to do so, we are forced to insist upon proper damages, to be deducted from invoices before settlement is made. As it seems we cannot agree between ourselves, we suggest that the whole matter be left to arbitration here by disinterested persons, who can decide the whole case.

We are satisfied that our position is correct and based upon law and justice, and is fully sustained by all the correspondence on the subject. In conclusion, we beg to say that it is not our custom to make complaints unless we have good grounds for same, and must confess that your views of our case, after you have seen all the papers, is much more partizan than we expected.

Very truly, y'rs, PELZER, RODGERS & CO.,
Gen'l Ag'ts Atlantic Phosphate Company of Charleston, S. C.

76 Directors: Francis J. Pelzer, president; Francis S. Rogers, treasurer; Wm. P. Hall, L. D. DeSaussure, J. B. E. Sloan, Wm. Lebby.

PELZER, RODGERS & CO., GENERAL AGENTS,
CHARLESTON, S. C., *May* 25, 1881.

Mr. JNO. C. GRAFFLIN, *Balto., Md.*

D'R SIR: In answer to your favor of the 18th we beg to say that our previous letter was neither written in anger or impatience, but simply contained our candid views in reference to the position you hold.

We have endeavored in every way to have the matter amicably arranged, but all of our propositions have been declined. We have carefully reviewed the whole matter, and find nothing to cause us to change our views of the same. Hoping that some satisfactory way may yet be agreed upon between us for settling this matter, we are, very truly,

PELZER, RODGERS & CO., *Gen'l Ag'ts.*

The within is the testimony as given at the hearing.
77 A. G. MAGRATH, *Pl'ff's Att'y.*
JAS. CONNER, *Def'ts' Att'y.*

After hearing the testimony, argument was made by Mr. West on behalf of the plaintiff, and by Mr. Conner on behalf of the defendants, and by Mr. Magrath in reply on behalf of the plaintiff.

And the defendants, by their attorney, Mr. Conner, prayed the

court to instruct the jury, which instructions and bill of exceptions are in the words and tenor following:

Defendants' Bill of Exceptions.

In the Circuit Court of the United States for the District of South Carolina.

JOHN C. GRAFFLIN *against* THE ATLANTIC PHOSPHATE COMPANY.

78 At the trial of the cause the testimony of both sides being closed, the defendants prayed the court to instruct the jury—

That if from the testimony the jury believe that the Atlantic Company never requested Grafflin to sell them these cargoes, and that there was no agreement between Grafflin and the Atlantic Company for the sale by Grafflin, and the purchase by the Atlantic of these cargoes, then the action cannot be supported, and the verdict should be for the defendants.

But the court refused such instruction, and defendants then and there, and before the jury had withdrawn from the bar, did except to such refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And the defendants prayed the court to instruct the jury:

That if there was a valid contract of sale for these cargoes between Radde and the Atlantic Company, then, as soon as
79 these cargoes were shipped from Hamburg to the works of the Atlantic Company, the property vested in the Atlantic Company, and there could be no sale of the goods by Radde to any other person so long as the Atlantic Company was solvent and ready and willing to perform their contract.

But the court refused such instruction, and the defendants then and there, and before the jury had withdrawn from the bar, did except to such refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And the defendants prayed the court to instruct the jury:

If from the evidence the jury are satisfied that the Atlantic Company purchased these cargoes from Radde, and that all that Grafflin did was to advance money to Radde or furnish a credit to him, and that he received the bills of lading from Radde as security
80 for his advances, then Grafflin had only a special property, and his transfer of the bills of lading to Atlantic Company was not a sale, and he cannot maintain action for goods sold and delivered.

But the court refused said instruction, and defendants then and there, and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And the defendants prayed the court to instruct the jury—

That to produce a change of property from the shipper to the consignee it is essentially necessary that the goods should have been sent in consequence of some contract between the parties by which the one agreed to sell and the other to buy.

But the court refused said instructions, and defendants then and there, before the jury had withdrawn from the bar, did except
81 to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And defendants prayed the court to instruct the jury—

That if the jury believe that Grafflin was aware of the contract of sale made by Dunan for Radde to the Atlantic Company and that the transfer of the bills of lading by Grafflin to the Atlantic was in pursuance of, and in execution of that contract, then there was no sale by Grafflin to the Atlantic Company, and plaintiff cannot recover.

But the court refused said instruction, and defendants then and there, before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And defendants prayed the court to instruct the jury—

82 If the jury believe Grafflin purchased Radde's interest in these cargoes, then he is entitled only to what Radde would be entitled to, and if the jury believe that the defendants sustained damage to the amount they claim, then they should allow that against Radde's claim or Grafflin's.

But the court refused said instruction, and defendants then and there, and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND. [SEAL.]

And defendants prayed the court to instruct the jury—

That the action by the assignee is without prejudice to any set-off or other defence existing at the time of or before notice of the assignment, and that it is for the jury to decide when the breach and damages occurred when the notice was given, or whether any notice had ever been given to the company.

83 But the court refused said instruction, and defendants then there, and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And defendants prayed the court to instruct the jury—

That if Grafflin had a lien on these cargoes for his advances to Radde, and parted with the goods without having any agreement

with Atlantic to pay his advances, he has lost his lien and must look to the party to whom he advanced for his redress.

But the court refused said instruction, and defendants then and there, and before the jury had withdrawn from the bar, did except to said refusal, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

84 And in lieu of said instructions the court instructed the jury as follows:

If the jury find from the evidence that the defendant, through Dunan, purchased from Radde, upon a contract made between Radde and the defendant, the kainit, mentioned in the pleadings and evidence, and that the plaintiff made the advances to Radde for the purchase of the kainit, and had the bills of lading and invoices made out in his name as the proof of his ownership and the amount of his advances, and forwarded to Pelzer, Rodgers & Co. his power of attorney authorizing them to enter the said merchandize in his name as owner, they being the agents of the Atlantic Phosphate Company, and to deliver the same to the said company, which accepted the merchandize, then the jury must find for the plaintiff the amount of the plaintiff's advances on the cargoes in suit, although they may find that Radde or Dunan did not faithfully perform the the contract spoken of above. The claim of the defendant for damages, if any, being against them and not against the plaintiff.

85 And to said instruction defendants then and there, and before the jury, withdrew from the bar, did except, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And the jury came into court with a finding for the plaintiff for the sum of fifteen thousand four hundred and fifty $\frac{42}{100}$ dollars, with interest from date of delivery of each cargo.

And it was moved by the attorneys for the plaintiff that the said finding should be recommitted to the jury to amend the same so as to insert in the same the interest due on each specific cargo.

And objection was made by attorney for defendant that interest was not due on an open account, and the court was prayed to instruct the jury that interest was not due on an open account. And the court ruled that interest was due, and so instructed the jury.

86 To which said ruling and instruction the defendants then and there excepted, and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, *C't Judge.* [SEAL.]

And the jury having amended their verdict so as to make certain the date from which the interest on each cargo should be com-

puted, the same was duly published by the clerk of the court, which verdict is in the words and tenor following:

We find for the plaintiff in the sum of $15,450.42, with interest on am't of ea. cargo from date of delivery thereof, being five days after date of entry.

May 9, 1882. S. Y. TUPPER, *Foreman.*

All objection to the form of the verdict being waived on either side.

87 And insomuch as the matters aforesaid do not appear by the verdict of the jury, the defendants prayed the court to sign and seal this their bill of exceptions, which is accordingly done this 9th day of May, anno Domini 1882.

HUGH L. BOND, *C't Judge.* [SEAL.]

And on the 20th day of May, A. D. 1882, came into court John C. Grafflin, the plaintiff, by his attorney, A. G. Magrath, and filed the following judgment, which judgment is in the words and tenor following:

Judgment.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

JOHN C. GRAFFLIN, a Citizen of the State of Maryland, Plaintiff,
against
THE ATLANTIC PHOSPHATE COMPANY, a Corporation created under and by the laws of the State of South Carolina, Defendant.

88 This action having been brought to a trial at a circuit court, held on the ninth day of May, A. D. 1882, and a verdict for the plaintiff having been rendered therein by the jury for the sum of sixteen thousand six hundred and eighty-four $\frac{27}{100}$ dollars, and the costs having been adjudged at forty-seven $\frac{45}{100}$ dollars:

Now, on motion of A. G. Magrath, attorney for said John C. Grafflin—

It is adjudged that John C. Grafflin recover of said Atlantic Phosphate Company sixteen thousand six hundred and eighty-four $\frac{27}{100}$ dollars so found, with forty-seven $\frac{45}{100}$ dollars costs.

[SEAL.] A. G. MAGRATH,
Pl'ff's Att'y.

Taxed costs, signed judg't & execution, May 20, 1882.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

89 And on the 20th day of May, A. D. 1882, came into court John C. Grafflin, the plaintiff, by his attorney, A. G. Magrath,

and issued the following execution, which execution is in the words and tenor following:

Execution.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

To A. Blythe, United States marshal, or his lawful deputies, Greeting:

Whereas judgment was rendered on the ninth day of May, one thousand eight hundred and eighty-two, in an action in the circuit court of the United States for the district of South Carolina, between John C. Grafflin, a citizen of the State of Maryland, plaintiff, and The Atlantic Phosphate Company, a corporation created under and by the laws of the State of South Carolina, defendant, in favor
90 of said plaintiff against the said defendant for the sum of sixteen thousand six hundred and eighty-four $\frac{27}{100}$ dollars, with interest at the rate of seven per cent. per annum from the ninth day of May, 1882, and also for the sum of forty-seven $\frac{45}{100}$ dollars, costs and charges therein, as appears to us by the judgment roll filed in the office of the clerk of the said court;

And whereas the sum of sixteen thousand six hundred and eighty-four $\frac{27}{100}$ dollars, with interest as aforesaid, and the sum of forty-seven $\frac{45}{100}$ dollars, costs and charges aforesaid, are now actually due thereon:

Therefore we command you, that you satisfy the said judgment out of the personal property of the said judgment debtor within your district, or if sufficient personal property cannot be found, then out of the real property in your district belonging to such judgment debtor on the day when the said judgment was so docketted in your district, or at any time thereafter, in whose hands soever the same may be, and duly return this execution according to law to
91 the clerk of the said court at Charleston, S. C.

Witness Hon. Morrison R. Waite, Chief Justice of the United States, at Charleston, S. C., the twentieth day of May, one thousand eight hundred and eighty-two.

[SEAL.]

A. G. MAGRATH,
Plaintiff's Attorney.
J. E. HAGOOD,
C. C. U. S. for Dis't, S. C.

Statement.

Amount of judgment	$15,450 42
Interest	1,233 85
Costs	
Attorney	20 00
Clerks	15 65
Marshal	1 80
	$16,731 72

92 Endorsements: United States of America, District of South Carolina, fourth circuit. John C. Grafflin, a citizen of the State of Maryland, plaintiff, against The Atlantic Phosphate Company, a corporation created under and by the laws of the State of South Carolina, defendant. Execution against property. A. Blythe, U. S. marshal for said district, levy and collect $16,731\frac{72}{100}$, with interest from the 9th day of May, 1882, besides your fees, &c. A. G. Magrath, attorney for judgment creditor. Received 20 May, 1882. A. Blythe, U. S. M.

93 And on the 12th day of May, A. D. 1882, came into court the defendant, The Atlantic Phosphate Company, by its attorney, James Conner, and filed the following bond in error, which bond in error is in the words and tenor following:

Bond in Error.

Know all men by these presents, that we, the Atlantic Phosphate Company, as principal, and Francis J. Pelzer, Jr., and Francis S. Rodgers, as sureties, are held and firmly bound unto John C. Grafflin in the full and just sum of twenty thousand dollars, to be paid to the said John C. Grafflin, his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this eleventh day of May, in the year of our Lord one thousand eight hundred and eighty-two.

94 Whereas lately, at a circuit court of the United States, for the fourth circuit, in and for the district of South Carolina, in a suit pending in said court between John C. Grafflin, plaintiff, and the Atlantic Phosphate Company, defendant, judgment was rendered against the said Atlantic Phosphate Company, and the said Atlantic Phosphate Company hath sued out a writ of error to the Supreme Court of the United States, and to reverse the judgment in the aforesaid suit, and hath filed a copy of said writ in the office of the clerk of the circuit court, and a citation directed to the said John C. Grafflin, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at the city of Washington, on the second Monday in October next:

Now the condition of the above obligation is such, that if the said Atlantic Phosphate Company shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, or else

95 to remain in full force and virtue.

[SEAL.] W. P. HALL,
Pres'd't pro tem. Atlantic Phosphate Company.
F. S. RODGERS, *Treasurer.*
FRANCIS J. PELZER, JR. [SEAL.]
FRANCIS S. RODGERS. [SEAL.]

Sealed and delivered in the presence of—
L. CHEVES.

Approval of Bond.

This bond is approved.
May 12th, 1882. HUGH L. BOND, *Ct. Judge.*

And on the 20th day of May, A. D. 1882, came into court the defendant, The Atlantic Phosphate Company, by its attorney, James Conner, and filed the following writ of error, which writ of error is in the words and tenor following:

Writ of Error.

96 THE UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the fourth circuit, in and for the district of South Carolina:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between John C. Grafflin, plaintiff, and The Atlantic Phosphate Company, defendant, a manifest error hath happened, to the great damage of the said Atlantic Phosphate Company, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same at Washington on the second Monday in October next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 20th day of May, 1882, in the year of our Lord one thousand eight hundred and eighty-two.

J. E. HAGOOD,
C. C. C. U. S., Dist of S. C.

[Endorsed:] The United States of America, district of South Carolina. In the circuit court. John C. Grafflin, plaintiff, *against* The Atlantic Phosphate Company, defendants. Writ of error. Filed 20 May, 1882. J. E. Hagood, C. C. C. U. S., Dist. S. C.

97 And on the 20th day of May, A. D. 1882, came into court the defendant, The Atlantic Phosphate Company, by its attorney, James Conner, and filed the following citation, which citation is in the words and tenor following:

Citation.

98 The United States of America to John C. Grafflin, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein The Atlantic Phosphate Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, at the city of Charleston, in the district aforesaid, this 12th day of May, A. D. 1882.

HUGH L. BOND, *C't Judge.*

I accept service of this citation.

27 May, 1882. A. G. MAGRATH, *Pl'ff's Att'y.*

[Endorsed:] TheUnited States of America, district of South Carolina. In the circuit court. John C. Grafflin, plaintiff, against The Atlantic Phosphate Co., defendants. Citation. Filed 20 May, 1882. J. E. Hagood, C. C. C. U. S., dist. S. C.

99 UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records, proceedings, and of the verdict in the case of John C. Grafflin, plaintiff, against The Atlantic Phosphate Company, defendant, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of the said court, at clerk's office, in the city of Charleston, and district of South Carolina, this the 19th day of June, A. D. 1882.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S. C.

Endorsed on cover: S. Carolina C. C. U. S. No. 256. The Atlantic Phosphate Company, plaintiff in error, *vs.* John C. Grafflin. Filed 16th August, 1882.

114-492

Supreme Court of the United States.

OCTOBER TERM, 1884—NO. 256.

THE ATLANTIC PHOSPHATE COMPANY, PLAINTIFF IN ERROR.

vs.

JOHN C. GRAFFLIN.

THIS IS AN ACTION FOR GOODS SOLD AND DELIVERED. 1

STATEMENT OF FACTS.

On the 10th May, 1880, the Atlantic Phosphate Company agreed to purchase from C. O. Radde, of Hamburg, 2,500 tons of Kainit, to be shipped between the 1st August and 31st October. By the terms of the contract, the Kainit was 2
to be delivered at the Company's wharf, on the Ashley River, port of Charleston. The stipulated price, $7.50 per ton, including freight and insurance, was to be paid cash on the delivery of each cargo. F. 68.

This contract was negotiated by Radde through his agent, W. S. Dunan, a broker, residing in Baltimore.

To enable Radde to purchase the Kainit, to fill this contract, an arrangement was made by Dunan with the plaintiff, Grafflin, by which the latter, in consideration of one per cent. commission, to be paid by Dunan, agreed to give 3
Radde a credit with Brown, Shipley & Co. (f. 32).

Radde purchased the Kainit, called for by his contract, and two cargoes, amounting together to 1,080 tons, were delivered to the Company some time in the fall of 1880. They were consigned to Grafflin, who endorsed the bills of lading, and sent them to Dunan, who delivered them to the defendant Company. (f. 33.)

Upon the arrival of the cargoes, the Company remitted
4 the purchase money to Dunan and took his individual receipt therefor. (f. 64.)

Later in the year, Radde purchased the remaining 1,420 tons of Kainit and shipped it on three vessels chartered by him, named the Texas, the Torfueus and the Ararat, and received from the Captains of said vessels, bills of lading, which describe Carl O. Radde as the shipper, and by their terms make the Kainit deliverable at the Atlantic Phosphate Company's wharf on Ashley River, to "J. C. Grafflin, or his assigns." As each cargo was shipped, Radde drew on
5 Grafflin for the full value, less the freight. (f. 55).

The Bills of Lading were prepared in the form above described, by the direction of Grafflin, through instructions communicated by him to Brown, Shipley & Co., at Dunan's request. (f. 32.)

Grafflin knew when the credits went forward, that the cargoes were for the Atlantic Company. (f. 32).

The bills of lading and other shipping documents were forwarded to Grafflin by Brown, Shipley & Co. Upon their receipt Grafflin endorsed the bills of lading in blank, and
6 sent them with the other papers, to Dunan "to carry out his agreements," (f. 32) and Dunan delivered them to the Atlantic Company.

When the bills of lading were forwarded to Dunan, by Grafflin, he was constituted Grafflin's agent, to collect the money advanced on each cargo, (ff. 30 and 31) but he was not instructed to require payment of the purchase money, before surrendering them.

On the contrary, Grafflin consented to an unconditional
7 delivery of the cargoes to the vendees. (ff. 29 and 55).

He pursued this course, he tells us, because he had perfect

confidence in the parties, and "never supposed they would dispute the bills. (f. 30).

The memorandum invoices which accompanied the bills of lading were made out in the name of Dunan, f. 36. On the 26th January, 1881, Dunan wrote to ask the Company's permission "to withdraw these invoices," and to substitute enclosed "invoices from Grafflin." (ff. 64 and 69.)

He did this, he says, "because having had consultations 8
with persons in New York concerning the best mode of transacting such business, he became satisfied that he ought not to have sent invoices in his name, but in Grafflin's, f. 39.

This was done without consultation with Grafflin, f. 34.

Mr. Rodgers testifies: "When Dunan asked for the substitution of invoices, we had all the shipping documents and bills of lading and power of attorney to enter the cargoes. We were not advised then that any one but Radde had an interest in the cargoes."

The Texas arrived on the 24th February, the Ararat on the 9
3d March, and the Torfueus on the 18th March.

The cargoes were entered in the Custom House at Charleston in Grafflin's name, by Thomas Inglesby, a member of the firm of Pelzer, Rodgers & Co., under a power of attorney given to the firm for that purpose, (f. 50).

The cargoes were delivered to the Atlantic Company, as holders of the bill of lading.

They were received by the Company under the contract made with Radde through Dunan (f. 66). At that time the Atlantic Company did not know that Grafflin had or claimed 10
any interest in the goods, except in so far as they were affected with constructive notice of such claim by the shipping documents forwarded to them (f. 64, f. 37).

After the cargoes had thus been received the Atlantic Company refused to make payment for them, unless they were allowed to set off certain damages, which they claimed to have sustained in consequence of Radde's failure to ship the goods within the time prescribed by the contract, and which are admitted to amount to $10,000 (f. 67).

Thereupon a correspondence ensued between Dunan and 11
the agents of the Company, which was protracted until 23d

April, when Grafflin for the first time claimed the proceeds of the cargoes. (f. 53).

The Company persisting in its refusal to pay, unless the damages it had sustained were allowed as a rebate, this suit was commenced in September, 1881.

12 **The action is for goods sold and delivered. The complaint contains several counts, in none of which is any agreement set out to pay any specified price for the goods.**

It also contains a count for money advanced, laid out, and expended by the plaintiff for the use of the defendant, at the special *instance and request of the defendant.*

The defendant's answer denies each and every allegation in the complaint, claims that the cargoes were received under their contract with Radde, sets up sundry breaches of that
13 contract, and claims the right to deduct the damages sustained by reason of these breaches from the purchase money.

The plaintiffs' reply alleges that Radde was not the owner of the kainit nor entitled to claim or receive the purchase money from the defendants—that the plaintiff was the owner thereof, and as such sold and delivered it to the defendants "at the the price understood and agreed to be paid by the defendants to him," and he denies that he "ever occupied any other relation than that of seller and buyer of the kainit set forth in the complaint."

14 At the close of the evidence the defendant requested the Court to give the jury the following instructions, f. 78, *et seq.*:

I. (f. 78.)

That if, from the testimony, the jury believe that the Atlantic Company never requested Grafflin to sell them these cargoes, and that there was no agreement between Grafflin and the Atlantic Company for the sale by Grafflin and the purchase by the Atlantic of these cargoes, then the action cannot be supported, and the verdict should be for the de-
15 fendant.

This instruction was refused, and the defendant excepted.

II. (f. 79.)

That if, from the evidence, the jury are satisfied that the Atlantic Company purchased these cargoes from Radde, and that all that Grafflin did was to advance money to Radde, or furnish a credit to him, and that he received the bills of lading from Radde as security for his advances, then Grafflin had only a special property, and his transfer of the bills of lading to the Atlantic Company was not a sale, and he cannot maintain an action for goods sold and delivered. 16

This instruction was refused, and the defendant excepted.

(III. f. 80.)

That to produce a change of property from the shipper to the consignee it is essentially necessary that the goods should have been sent in consequence of some contract between the parties by which the one agreed to sell and the other to buy.

This instruction was refused, and the defendants excepted. 17

IV.

That if the jury believe that Grafflin was aware of the contract of sale made by Dunan for Radde to the Atlantic Company and that the transfer of the bills of lading by Grafflin to the Atlantic Company was in pursuance of and in execution of that contract, then there was no sale by Grafflin to the Atlantic Company, and the plaintiff cannot recover.

This instruction was refused, and the defendant excepted. 18

V.

That if Grafflin had a lien on these cargoes for his advances to Radde and parted with the goods without having any agreement with the Atlantic Company to pay his advances, he had lost his lien and must look to the party to whom he advanced for his redress.

This instruction was refused, and the defendant excepted.

Other instructions were asked and refused. They will not be insisted on here, and further reference to them is unnecessary. 19

In lieu of instructions asked for by the defendant, the Court instructed the jury as follows:

"If the jury find from the evidence that the defendant, through Dunan, purchased from Radde, upon a contract made between Radde and the defendant, the kainit mentioned in the pleadings and evidence, and that the plaintiff made the advances to Radde for the purchase of the kainit, and had the
20 bills of lading and invoices made out in his name *as the proof of his ownership* and the amount of his advances, and forwarded to Pelzer, Rodgers & Co. his power of attorney, authorizing them to enter the said merchandise in his name as owner, they being the agents of the Atlantic Phosphate Company, and to deliver the same to the said Company, which accepted the merchandise, then the jury must find for the plaintiff *the amount of the plaintiff's advances on the cargoes in suit*, although they may find that Radde or Dunan did not faithfully perform the contract spoken of above. The claim of the defendant
21 for damages, if any, being against them, and not against the plaintiff."

And to said instructions, defendants then and there, and before the jury withdrew from the bar, did except.

And the jury came into Court with a finding for the plaintiff for the sum of fifteen thousand four hundred and fifty 42-100 dollars, with interest from date of delivery of each cargo.

And it was moved by the attorneys for the plaintiff that the said finding should be recommitted to the jury to amend the same, so as to insert in the same the interest due on each
22 specific cargo.

And objection was made by attorney for defendant that interest was not due on an open account, and the Court was prayed to instruct the jury that interest was not due on an open account. And the Court ruled that interest was due, and so instructed the jury.

To which said ruling and instruction the defendants then and there excepted.

And the jury having amended their verdict so as to make certain the date from which the interest on each cargo should
23 be computed, the same was duly published by the Clerk of the Court, which verdict is in the words and tenor following:

We find for the plaintiff in the sum of $15,450.42, with interest on amount of each cargo from date of delivery thereof, being five days after date of entry.

May 9, 1882. S. TUPPER, *Foreman.*

All objection to the form of the verdict being waived on either side.

ARGUMENT.

24

The proposition contained in the first request to charge, is a correct statement of the law, and strictly applicable to the case. The defendant was, therefore, entitled to have it given to the jury, if not in the precise form asked, at least in substance.

We presume it will not be denied that, to a contract of sale, as to every other contract, there must be two parties, who must agree to all the terms of the contract. The contract may unquestionably be inferred from circumstances, but its 25
existence, and if it be not in writing, its terms are always questions of fact for the determination of the jury.

We take it too to be a rule of law that no one can be made to buy of another without his own assent. If a man makes a contract, intending it to be with one particular person, no other person can convert that into a contract with him.

The question, in this case, is not to whom the goods delivered to the Company belonged, but with whom the contract was made, under which they were delivered.

A mistake as to the *person* with whom the contract is made 26
may or may not avoid the sale, according to the circumstances. * * * Where the identity of the person is an important element in the sale, as when the purchaser buys from one whom he supposes to be his debtor, and against whom he would have the right to set off the price; a mistake as to the person dealt with prevents the contract from coming into existence for want of assent."

Benj. on Sales. Sec. 56.

In *Boulton vs. Jones, 2 H. & N. 564,* the plaintiff had bought 27
out the stock in trade and business of one Brocklehurst. The

defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst on the very day of the transfer to the plaintiff, and the latter supplied the goods. When payment of the price was afterwards demanded, the defendant refused, on the ground that *he had a set off against* Brocklehurst, and had not contracted with the plaintiff. The Barons of the Exchequer were all of opinion that the action
28 could not be maintained.

Pollock, C. B., said: "The rule of law is clear, that if you propose to make a contract with A, then B cannot substitute himself for A, without your consent and to your disadvantage, securing to himself all the benefit of the contract."

Martin, B., said: "When the facts prove that the defendant meant to contract with A alone, B can never force a contract upon him."

Bramwell, B., said: "It is clear that if the plaintiff were at liberty to sue, it would be a prejudice to the defendant, be-
29 cause it would deprive himself of a set off, which he would have had, if the action had been brought by the party with whom he supposed he was dealing;"

Channell B. said: "The case is not one of principal and agent; it was a contract made with B., who had transactions with the defendant, and owed him money, and upon which it seeks to sue."

In *Randolph Iron Co. vs. Elliott, 34 N. J. L., 184*, the plaintiff had delivered ore to the defendant on a contract for such delivery to be made by one Chandler. The Court said: "If
30 the defendant purchased ore of Chandler, and the plaintiffs, without his knowledge or consent delivered their own ore, the relation of vendor and purchaser does not exist between them."

In *Boston Ice Co. vs. Potter, 123, Mass. 29*, the Court says: To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated, no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but on account of some dissatisfaction with the manner of supply, he
31 terminated his contract, and made a contract for his supply with the Citizens Ice Co. The plaintiff afterwards delivered

ice to the defendant for one year, without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens Ice Company until after the delivery and consumption of the ice.

"There was no privity of contract established between the plaintiff and the defendant, and without such privity, the possession and use of the property will not support an implied assumpsit. And no presumption of assent can be implied 32
from the reception and use of the ice because the defendant had no knowledge that it was furnished by the plaintiff, but supposed he had received it under the contract with the Citizens Ice Company."

In this case the evidence shows conclusively that the defendants' contract was with Radde, that they supposed they had received the goods under that contract, that they believed that the goods so received were Radde's property, and that they did not intend to enter into any contract with Grafflin, for their purchase. 33

Mr. Rodgers, the agent of the Company, testified, f. 66: "I got the cargoes upon bills of lading I had in my possession; the cargo came here under a contract made by us with Dunan." "I did not know Grafflin in the transaction; I received the goods under contract with Dunan—with Radde." (f. 67).

Q. Did Dunan ever give you any notice that Radde had ceased to be, and Grafflin had become the owner of these cargoes?

A. None. 34

Q. Did he ever notify you that Grafflin had any interest in these cargoes?

A. Not a word until after the difficulty. (f. 64).

Again, (f. 65), "up to the last letter Dunan wrote, nothing was said of Grafflin's having any interest in the cargoes or anything to do with them." (f. 37).

Dunan, the plaintiff's witness, testified as follows:

Q. In these transactions, did you notify Pelzer, Rodgers & Co. in any way that you were acting as agent for Grafflin?

A. I cannot recollect. I may have asked them to remit the 35
money to me for Grafflin.

Q. Did you ever notify them in these transactions, that the cargoes were the property of Grafflin?

A. No.

And at f. 38—

Q. Did you deliver the shipping documents for these cargoes in pursuance of any contract between Grafflin and Pelzer, Rodgers & Co?

36 A. No contract that I know of, except I supposed it was understood between all of us, how the goods were coming.

It is plain, then, that there was no intention on the part of the defendants, to buy from Grafflin. They intended to buy from Radde alone, and assumed, and had a right to assume, that the cargoes were delivered under their contract with him.

Even then if the goods were the property of Grafflin, and were delivered under the mistaken belief that the defendant company had contracted to buy from *him*, *this action* cannot

37 be maintained.

But we think that the evidence shows just as conclusively that Grafflin did not intend to sell the cargoes to the defendant, but understood perfectly well that they were delivered to the defendants under Radde's contract.

In his letter of April 23d, 1881, (f. 55). Mr. Grafflin thus states his relation to these cargoes, and to the defendants:

"I have endeavored to be the medium of transactions between the *seller in Germany* and the buyer on this side, by furnishing the credit, without which the transactions would

38 have been much more difficult if not impossible. I have done this by purchasing Radde's whole interest in his cargoes, as in every instance he draws immediately upon the shipment for full value, less freight, and Mr. Dunan, who then becomes my agent for the realization of the draft, (his advances) *by my consent, proceeds to permit deliveries of the cargoes in honor of Radde* without requiring cash before delivery. I take Radde's cargoes off his shoulders and *honor his sale* in such manner as to give the purchasers the greatest ease in getting their goods."

And in his letter of the 18th May, (f. 58), he says: "My

39 sin against you, is, that I have, in the first place, enabled an exporter to contract with you for goods from Germany, and

in the second place, have treated you as personal friends, and turned over the goods without demanding payment on delivery."

Now, it is perfectly clear that when these letters were written—two months after the delivery of the cargoes,—Grafflin understood perfectly well that he was not the seller, but the medium of communication between the seller and the buyer, advancing the money to enable Radde to complete his 40
contract of sale, and then waiving his right to hold the cargoes as security for his advances, in order that they might be delivered in honor of *Radde's contract*.

And when on the witness stand a year later, the plaintiff gives the same version.

"My object in making the advances, was to assist Mr. Dunan in his business, knowing that he had not the means." "The cargoes were the security I had for the liability." "In these cargoes, brought out by Dunan, for Radde, in which I acted as banker, I never wanted acceptances." "I loaned my 41
credit on commission. * * That was all my interest in these cargoes." "The documents came to me through Brown Shipley & Co. I handed them over to Dunan *to carry out his agreements*." "I had no correspondence with Pelzer, Rodgers & Co., with regard to the sale of the cargoes; only sold the cargoes to them through my advances. They never asked me to sell. They never asked me to advance." (Q). "Radde never sold to you? A. No. (Q). Nor you to the Atlantic? A. Except as advancing as banker. (Q). You never advised Pelzer, Rodgers & Co., that you were the sel- 42
lers? A. No; when the bills of lading came to me, I endorsed them, and delivered them to Dunan, who forwarded them to Pelzer, Rodgers & Co."

We submit, then, that the plaintiff, not only failed to prove the contract of sale alleged in his complaint, but that his own testimony established the negative.

This was evidently the opinion of the Court, for the instruction given rested the plaintiff's right to recover, not upon the ground that a contract of sale had been proved, but upon an entirely different ground. Indeed the charge assumes 43
throughout "that the defendant through Dunan purchased

from Radde, upon a contract made between Radde and the defendant."

In this state of the evidence, the Court should, of its own motion, have instructed the jury to find a verdict for the defendant. It was at least bound to grant the first instruction asked for, and its refusal to do so was error.

II.

44 The assignments of error, based on the refusal of the Court to grant the 2d, 3d, 4th and 5th requests of the defendants will be considered together.

The foundation of the plaintiff's complaint is, that he was the general owner of the Kainit delivered to the defendant Company.

The evidence clearly shows that the Kainit was purchased by Radde, with his own funds or upon his credit. It was only after shipment that Radde drew on Grafflin, through
45 Brown, Shipley & Co. f. 55.

In the declaration made before the U. S. Consul, at Hamburg, f. 39, Radde swears that he is the "owner of the goods," and the certificate of the Consul, f. 41, is to the same effect.

How, then, did Grafflin become the owner of these cargoes?

The reply given by the other side, is by his being named as consignee in the Bill of Lading.

But the answer to this is that the effect of a Bill of Lading as between consignor and consignee depends on collateral facts *in pais* and extrinsic circumstances.
46

If the consignee is the mere agent of the consignor, he has no property in the goods.

If the goods are made deliverable to the consignee, by name, and are transmitted to him as security for advances, the consignee acquires a special property in the goods.

"To produce a change of property from the shipper to the consignee, it is essentially necessary that the goods should have been sent in consequence of some contract between the parties by which the one agreed to sell, and the other agreed
47 to buy."

The Frances, 8 Cranch, 359, 9 Cranch, 183.

In this case the record plainly shows that there was no sale by Radde to Grafflin, but that the general property in these cargoes either remained in Radde or passed to the Atlantic Company, subject to a right of possession acquired by the plaintiff, by the delivery to him of the Bills of Lading, in which he was named as consignee.

The admissions and proofs show that prior to the commencement of this action, the plaintiff did not pretend to 48
claim as owner, but only to have a lien by reason of his advances made to Radde, and even on the trial he said: "The cargoes were the *security* I had for the liability." (f. 29.)

"I loaned my credit on commission of one per cent. on advances. *That was all my interest in* these cargoes."

If, then, Grafflin had only a special property by way of pledge, in these cargoes, it follows that the transfer of the Bills of Lading by him to the Atlantic Company was not a sale.

"The third essential of a sale is, that there should be a 49
transfer of the *absolute* or *general* property in the thing sold.
* * * A transfer of the special property is not a sale of the thing."

Benjamin on Sales, § 1.

And it follows also that the surrender of the Bills of Lading, by the plaintiff, with his blank endorsement thereon to the purchaser under Radde's contract of sale extinguished any lien he might otherwise have had.

III. 50

The charge of the Court was erroneous in several particulars.

The first error which we shall notice is, that it entirely changed the issues in the case.

The action was for goods sold and delivered under a special contract.

The charge ignored the case made by the pleadings, and directed the jury to find for the plaintiff not the price of the goods, or even their value, but the amount advanced by 51
plaintiff to the vendor.

The Code of Procedure of South Carolina, Sec. 105, provides that the complaint shall contain "a plain and concise statement of the facts constituting the cause of action." Obviously, the object of this provision is, that the matter upon which the judgment of the Court is sought, shall be clearly stated, and the party charged notified, that he may make his answer to it. It is not mere form, but substance, that such
52 party shall have an opportunity to be heard upon the very issue that is to be decided, for he is, necessarily surprised if one issue is tried and another decided.

Now, it is manifest that the object of the Legislature in making this requirement will be defeated if the Court possesses the power to change by instructions the issues which the pleadings present.

Such power has certainly been denied to the State Courts in South Carolina.

In *Fitzsimmons vs. Guanahani Company, 16 S. C., 193*, an
53 inspector of Phosphates in Georgia brought an action to recover for an inspection made in South Carolina, the fees allowed by a Georgia Statute.

The Judge charged the jury that the plaintiff could not recover, by virtue of the Statute of Georgia, but that there was nothing to prevent the defendant from employing the plaintiff to perform the services rendered, and in the absence of a special contract, his compensation would be governed by the character and value of the services rendered, to be determined by the jury on the facts proved.

54 Upon appeal the Supreme Court said:

"The propositions of law then laid down by the judge, we think, were entirely correct in the abstract, and would have been correct here, if this action had been founded upon a *quantum meruit*. But the action was not founded upon a claim of that kind; it was brought on a special contract, alleged to have arisen under the provisions of the Statute of Georgia referred to. This being so, the effect of the Judge's charge was to change the nature of the action, during the progress of the trial, from an action on a special contract,
55 which the pleadings prescribed, and which the parties had met to have adjudicated, to an action on a *quantum meruit*, which

did not appear in the pleadings, and which, therefore, was calculated to take the defendant by surprise."

"We think it was error on the part of the Judge thus, in the midst of the conflict to change the whole character of the action, from the cause on which it was originally established, to a new basis, not appearing on the pleadings and without opportunity on the part of the defendant to meet and resist it."

In *Dunsford vs. Brown, 19 S. C., 565*, the Court said: "It 56
is true, the provisions of the Code are very liberal in allowing amendments, and we are thoroughly in accord with that spirit, in so far as it prevents the requirements of form from degenerating into mere technicalities, yet it seems to us that it may be possible to fall into the opposite extreme, and in the effort to dispense with all form, to produce confusion, uncertainty and injustice. Section 194 of the Code is in these words: The Court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading process or proceeding, by adding or striking out 57
the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, when the amendment does not change substantially the claims or defence, by conforming the pleading or proceeding to the facts proved."

"This certainly gives a large discretion in the matter of amendments, but the provision itself shows that some limit was contemplated. The power is given to conform the pleadings to the facts proved only "when the amendment does not change substantially the claim or defense." 58

In the still more recent case of *Whaley vs. Stevens, S. C.*, the Court says:

"It is claimed, however, by the respondent, that if we should take this view of the case, he should be allowed to amend his complaint by inserting an allegation that the right of way begins on the Caneslatch plantation. It is very true that the provisions of the Code in respect to amendments are very liberal, but there is one qualification in this respect, and that is, that the amendment asked for 'does not change substantially the claim or defense.' Code of 1882, Sec. 194. So 59
that the inquiry is, Does the proposed amendment change

substantially the claim of the plaintiff? It appears to us that it does. As we have seen, the claim set up in the complaint is a claim to right of way in gross and the amendment asked for is to change that claim into a right of way appurtenant to the land of the plaintiff. These two rights differ substantially, not in form merely but in their nature and results. The violation of these rights present different and distinct causes
60 of action which would have to be asserted and established by different and distinct allegations and proofs; and hence we think the proposed amendments would change substantially the claim set up in the complaint and cannot be allowed."

It is clear, then, that under the system of pleading in South Carolina, as expounded by her highest Courts, an action for the sale and delivery of goods under a special contract cannot by amendment—still less upon the trial without amendment—be converted into an action for the recovery of the advances made by a third person to the vendor, even if secured by a
61 pledge of the goods sold.

The language of this Court in *Phillips vs. Seymour, 91 U. S., 654*, is therefore directly applicable to this case. In that case this Court said:

"But the State of Illinois has adhered to the system of pleading which recognizes the lines that separate the forms of action at common law, and the Act of Congress requires the Circuit Court to conform to the mode of pleading of the State in which the Court sits. * * * There is no room
62 here for amendment. There could have been none in the Court below. To allow a verdict to stand which is responsive to no issue made by the pleadings, or which could have been made by any pleading in that action is farther than we can go in the promotion of abstract justice."

In *Thorwegan vs. King, 111 U. S., 555*, "The charge assumes that the plaintiff's case was based upon a fraudulent suppression of material facts, knowledge of which the defendant was under some legal duty to communicate, and that there was evidence before the jury tending to prove the allegation. The assumption is wrong in both parts. No such
63 averment is made in the pleadings. * * * The Court,

therefore, should have confined its instructions to the jury to the point really involved in the issue."

But the instructions given to the jury are open to the further objection that they were founded on only a part of the evidence in the case.

No allusion is made in the charge to the following important facts, which were proved beyond a reasonable doubt:

1st. That the bills of lading, though originally to Grafflin's order, had been endorsed in blank and delivered to the agent of the vendor for the express purpose of enabling him to make an unconditional delivery of the cargo in execution of his contract. 64

2d. That the defendant company accepted these cargoes without any knowledge that Grafflin claimed an interest in or lien on the cargoes for advances made to Radde.

The charge was therefore unjust to the plaintiffs in error, because it required the jury to shut their eyes to all the evidence on one side of the issue to which the charge refers. 65

The case of *Greenleaf vs. Booth, 9 Peters, 292*, is an authority, if any be needed, that a judgment based on a charge of this description will be set aside.

It cannot be said that these omissions were the result of inadvertence, for the attention of the Court was repeatedly called to these facts and it was requested to give instructions predicated upon them—ff. 80 and 81.

Lastly, we submit that if all the facts hypothetically stated in the charge were admitted, and they were the only facts in the case, they would not warrant the conclusion attempted to be drawn from them, to wit, that the defendant was liable for the amount of the *plaintiff's advances*. 66

No argument or citation of authority is necessary to show that one who purchases property which is subject to a lien is not personally liable for the payment of the lien debt, unless he assumes payment of it.

But we will not consume time in discussing a point not before the Court.

IV.

The last assignment of error is that the Court instructed the jury to allow the plaintiff the interest due on each specific cargo." 67

This contract, if made at all, was made in South Carolina—was to be performed there—and must be governed by the law of that State.

In South Carolina it has been settled that, in an action for goods sold and delivered, the plaintiff, to entitle him to interest, must allege and prove a special contract to pay interest.

In *Rice vs. Hancock, Harper's R.*, the Court says:

68 "As a general principle, it cannot be denied that an account for goods sold and delivered will not carry interest."

In *Schermerhorn vs. Pirman, 2 Bailey, 173*, it was ruled "that interest is not recoverible on the common count for goods sold and delivered. The agreement to pay interest, or circumstances from which such an agreement may be implied, must be set out in the declaration, and the absence of such a count, setting forth such agreement, express or implied, is not supplied by a charge for interest in the bill of particulars."

In *DeGroot vs. Darby, 7 Rich. L., 120*, the Court says:

69 "It cannot be said in the ordinary transaction of the sale of goods that interest is an incident of the contract itself. The first inquiry is, whether there was a special agreement to pay interest *co nomine*."

In this case no special agreement to pay interest was alleged and certainly none was proved.

In the pleadings and the Judge's charge it is treated as incident of the contract.

S. LORD,

Counsel for Plaintiff in Error.

114-492

IN THE

Supreme Court of the United States.

October Term 1884.—No. 256.

THE ATLANTIC PHOSPHATE COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN C. GRAFFLIN, DEFENDANT IN ERROR.

Error to the Circuit Court of South Carolina.

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

AS TO DEFECTS IN THE BILL OF EXCEPTIONS.

The bill of exceptions does not contain any statement as to the evidence, and contains no reference to any such statement. The clerk has certified up a stipulation as to the evidence (fol. 76), but this is not sufficient, because it is no part of the bill, has not the seal or signature or approval in any form of the judge who tried the case, does not appear to have been submitted to him, and is not referred to in the bill. The insufficiency of such a bill of exceptions has been often declared by this court.

"If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it

must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions."

Leftwich *v.* Lecanu, 4 Wall., 189.

"What purports to be the entire deposition of Baker is sent up by the clerk of the District Court and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless incumbrance of the transcript and an expense to litigating parties."

Russell *v.* Ely, 2 Black., 580.

McArthur *v.* Porter, 1 Pet., 626.

Chaffee *v.* Belting Co., 22 How., 217.

"Copies of deeds and a stipulation in respect to evidence are found in the transcript, but they are nowhere referred to in the bill of exceptions, and it is not even stated in the record that they were used at the trial."

Jones *v.* Buckell, 104 U. S., 557.

In Reed *v.* Gardner, 17 Wallace, 409, there was in the transcript a number of depositions, exhibits, certificates, &c., which appeared to have been used in the trial of the case. The court held that they could not be considered, and that it would not look beyond the bill itself.

Also Dunlop *v.* Munroe, 7 Cranch, 242.

Knapp *v.* R. R. Co., 20 Wall., 241.

"We do not look to the charge of the judge for the state of the evidence on which the very charge is held to be right or wrong."

Worthington *v.* Mason, 101 U. S., 152.

Lincoln *v.* Claflin, 7 Wall., 136.

See also England *v.* Gebhard, 112 U. S., 502.

If the matter contained in the stipulation (fol. 76) had been embodied in the bill of exceptions, the bill would have been bad, because it is the settled rule of this court that the evidence must not be brought up.

Lincoln *v.* Claflin, 7 Wall., 136.

On the Merits.

Grafflin, the defendant in error, was plaintiff below and the Atlantic Phosphate Company, the plaintiff in error, was defendant below. For the sake of brevity the defendant in error will be spoken of by his name and the plaintiff in error as the Phosphate Company.

Grafflin sued the Phosphate Company on five special contracts for the prices of goods sold and delivered (fols. 1, 2, 3, 4, 5, 6). To the complaint was annexed, to be taken as a part of it, an account showing the details of each sale referred to in the declaration (fol. 10). The aggregate of the prices sued for was $15,450.42 (fols. 8, 11), and interest was asked on each price from the date at which it accrued (fols. 8, 9).

The Phosphate Company set up three defenses in its answer:

1. It denied the existence of any contract with Grafflin. The company's agent, under oath, denied *every* allegation of the complaint, but the real purpose of this, however, seems to have been, as above stated, to deny the contract.

2. It alleged title in itself in the goods.

3. It claimed the right to set off against Grafflin's rights under his contract certain damages arising out of the breach of contract between it and one Radde. This defense seems to go on the ground that Grafflin had been Radde's principal in the said contract.

The parties went to trial on these issues.

At the trial, instructions were asked in respect to the second (fol. 79) and third defenses (fols. 82 and 83), but no evidence was offered to sustain them, and they were refused, and have been abandoned in argument.

The errors now alleged relate—

1. To the existence of a contract.

2. To the right to interest.

If the court will look into the stipulation (fol. 76) to learn what occurred at the trial it will appear that the following evidence was offered:

The evidence offered by Grafflin tended to show that the Phosphate Company entered into contracts, through one Dunan, with one Radde, for the delivery of kainit in Charleston by him to the company; that Radde borrowed the money with which he bought the kainit from Grafflin, and in order to secure Grafflin for his advances took the bills of lading and consular invoices in Grafflin's name (fols. 29, 35, 42, 48, 49); that the bills of lading, the consular invoices, the charter-party, and memorandum invoices in the name of Grafflin were sent to the Phosphate Company in Charleston by Grafflin through Dunan (fols. 29, 33, 34, 35); that Dunan was agent of Grafflin to collect the moneys due for the cargoes, and for no other purpose (fol. 31); that with the other papers was sent a power of attorney from Grafflin to Pelzer, Rodgers & Co., the agents of the Phosphate Company, giving authority to them to enter the kainit at the custom-house in his (Grafflin's) name; and that the Phosphate Company received the kainit under this power of attorney (fols. 46, 62).

Grafflin testified that he indorsed the bills of lading, but the copy in the transcript (fols. 48, 49) does not bear an indorsement.

The memorandum invoices introduced in evidence were in this form (fol. 68):

"BALTIMORE, *January 15th*, 1881.

"Atlantic Phosphate Company, Charleston, S. C., bought of John C. Grafflin."

The evidence also tended to show that Dunan at first sent memorandum invoices in his own name (fol. 36); but on January 25th, 1881, asked to substitute invoices in the name of Grafflin (fol. 63). His letter was in these words (fol. 69):

"BALTIMORE, *January 25th*, 1881.

"ATLANTIC PHOSPHATE CO., Charleston, S. C.

"GENTLEMEN: I wish to withdraw all my invoices sent you, with the documents for these cargoes, and substitute instead the inclosed invoices from Mr. John C. Grafflin, as all these cargoes come out in his name, and you will please return to me my invoices by return mail. In remitting for these cargoes, please remit in name of John C. Grafflin, through me. In the future I will always furnish invoice in favor of name in which the cargo comes forward.

"I inclose you herewith Mr. John C. Grafflin's invoices for the cargoes which are now coming forward and for which you have the documents.

"Yours, truly,

"WINFIELD S. DUNAN,
"Per MINER."

At the date of this letter the cargoes had not been received (fol. 38). They were all subsequently received (fols. 62, 16) apparently between February 24th, 1881, and March 18th, 1881 (fol. 10).

The statement in the brief of the Phosphate Company (fol. 6) that Grafflin assented to an "unconditional delivery" of the cargoes is correct, in the sense that there was no evidence to show that he made payments of the prices con-

ditions of the delivery, but not in the sense that there was evidence to show that he waived his right to payments.

It is said in the brief of the plaintiff in error that the bills of lading were indorsed. It is to be observed that on this point there was a conflict of evidence.

At the trial, the Phosphate Company prayed nine instructions, all of which were refused. The first, third, fourth, fifth, and eighth prayers related to the existence of the contract; the tenth to the question of interest. The other prayers are abandoned.

The court gave a single instruction (fol. 84).

The verdict was for $15,450.40, the sum of the invoices (fol. 49), and interest on each invoice. Judgment was entered on this verdict.

It will be convenient to consider first the instruction given. If that was correct and covered the case, then those refused were wrong or unnecessary.

The instruction was in these words:

"If the jury find from the evidence that the defendant, through Dunan, purchased from Radde, upon a contract made between Radde and the defendant, the kainit mentioned in the pleadings and evidence, and that the plaintiff made the advance to Radde for the purchase of the kainit, and had the bills of lading and invoices made out in his name, as the proof of his ownership and the amount of his advances, and forwarded to Pelzer, Rodgers & Co. his power of attorney authorizing them to enter the said merchandise in his name as owner, they being the agents of the Atlantic Phosphate Company, and to deliver the same to the said company which accepted the merchandise, then the jury must find for the plaintiff the amount of the plaintiff's advances on the cargoes in suit, although they may find that Radde or Dunan did not faithfully perform the contract spoken of above, the claim of the defendant for damages, if any, being against them and not against the plaintiff." (Fol. 84.)

The direction to the jury to find Grafflin's "advances," taken by itself, is open to criticism; but the whole tenor of the instruction shows that "advances" was used, as identical with "invoice prices." In the preceding part of the instruction the invoices were spoken of as showing the sum of Grafflin's advances. The jury was not misled and the Phosphate Company not injured by the use of the word "advances," because the verdict was for the exact sum of the invoices, viz., $15,450.42 (fols. 86, 49).

It is a settled rule of this court that a judgment will not be reversed for an error that works no harm.

The instruction, construed as a direction to find for Grafflin the "invoice prices," is correct, and presents the issue raised by the pleadings.

The instruction was in effect that the receipt and acceptance of the goods by the defendant under a bill of lading, and a power of attorney showing the title of Grafflin and invoices showing the transaction to be a sale, created an implied promise on the part of the Phosphate Company to pay Grafflin the invoice prices.

It would not have been error to instruct the jury to find for Grafflin. There was no conflict in the testimony or dispute about the facts. The bill of lading in the name of Grafflin, the consular invoices in his name, the memorandum invoices containing the words "Atlantic Phosphate Company, bought of John C. Grafflin," the power of attorney given by Grafflin to the defendant, and the letter of Dunan of January 25th, 1881, were shown without contradiction to have been in the hands of the Phosphate Company when the cargoes arrived. The receipt and appropriation of the goods is admitted. On these facts the jury might have been instructed to find for Grafflin.

If there can be such a thing as an implied promise to pay, it is difficult to conceive of a state of facts in which the implication of one would be stronger. The Phosphate

Company to succeed must show that there can be no promise but an express one.

The implication of a promise from the facts in the case is the stronger, because the transaction is one of constant occurrence in commerce. Most of the sales in commerce are conducted on credit, and the method of securing the lender is precisely the one used in this case. It is hardly possible that the agents of the Phosphate Company did not understand the transaction. Neither in the answer nor in the testimony have they said that they were, in fact, misled. The reliance of the Company is on the absence of an express contract.

It is no exaggeration to say that the larger number of contracts made in daily life are implied or inferred contracts. (See Pollock on Contracts, p. 28.)

Every element of a contract was presented in this case. The title of the goods was in Grafflin, and the Phosphate Company had notice of it. The invoice "Atlantic Phosphate Company, bought of John C. Grafflin," was, in substance, an express offer to sell at the price mentioned in the invoice (fol. 48). If anything was needed to make the matter plainer, it was made so by Dunan's letter of January 25th, 1881 (fol. 69).

"The assent of parties to a sale need not be express; it may be implied from their language or from their conduct; may be signified by a word or a gesture; or may even be inferred from silence, in certain cases; as, if a customer takes up wares off a tradesman's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods."

Benjamin on Sales, 2d Am. Ed., p. 32.
Bl. Com., Book II, ch. 30, p. 443.

"Contracts of sale are implied, under certain circumstances, without any expression of the will or intention of the parties; as where, for example, an express contract

has been made and goods are sent not in accordance with it, but are, nevertheless, retained by the purchaser. In such case a new contract is implied that the purchaser will pay for them their value."

Ibid, p. 40.

An invoice is *prima facie* a contract of sale.

"If brokers alter an invoice of the owner of goods from the name of one purchaser to another, and send it to the latter, with a letter saying that to simplify the transaction they had transferred the seller's invoice to him, such invoice will amount to a contract of sale.

Pauli *v.* Simes, 6 C. & P., 506.

Also, Jones *v.* Littledale, 6 A. & E., 486.

Holding *v.* Elliott, 5 H. & N., 117.

It is said that the instruction ignored the fact that the bills of lading indorsed by Grafflin had been delivered to Radde's agent, to enable him to make a delivery under the contract between Radde and the Phosphate Company (fol. 64).

The answer to this is that, first, that there was no evidence to that effect; second, that the issue was as to the character of the delivery and not as to Dunan's instructions.

It is said that the instruction ignored the fact that the Phosphate Company did not know that Grafflin claimed an interest in the cargo (fol. 64).

This means that Grafflin did not, in formal words, state his rights. But the very point of the instruction is, that the documents furnished knowledge of his rights.

It is perfectly true, as argued, that if you make a contract with A, B cannot substitute himself as the vendor.

All the cases cited turn upon facts. In all, there was no contract with the person suing. In the present case the evidence is that the contract was with Grafflin, and the Phosphate Company is endeavoring to substitute Radde as the vendor.

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All the cases cited turn upon facts. In all, there was no contract with the person suing. In the present case the evidence is that the contract was with Grafflin, and the Phosphate Company is endeavoring to substitute Radde as the vendor.

"But care must be taken not to confound a common mistake as to the subject-matter of the sale, or the prices, or the terms which prevent the sale from ever coming into existence by reason of the absence of a '*consensus ad idem*,' with a mistake made by one of the parties as to a collateral fact, or what may be termed a mistake in motive."

Benjamin on Sales, 2d Amer. Ed., p. 44.

The remark of Lord Cairns in Sheperd *v.* Harrison (5 H. L., 133) is applicable to this case:

"I therefore think that when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words, 'We require you to take notice that our object in inclosing these bills of lading and bills of exchange is, that before you use the bills of lading you should accept the bills of exchange.' Merchants know perfectly well what they mean when they express themselves, not in the language of lawyers, but in the language of courteous mercantile communication; and I do not think that any merchant in England receiving a bill of lading and a bill of exchange under these circumstances, when he came to reflect on the matter, would feel any doubt that he could not retain the one without accepting the other."

The five prayers of the Phosphate Company which were refused all go to the point that there was no contract between Grafflin and the Phosphate Company.

The first prayer goes on the ground that there could be no contract if there had not been a request and an agreement between the parties. The request and agreement meant are evidently an express request and an express agreement, and the instruction would have been misleading by including, from the first, the evidence of an implied agreement.

The third prayer insists that there was no contract, because Grafflin had the goods only as security. That was

plainly error. Under the bill of lading he took a complete legal title.

The fourth prayer insists on an express contract, and was erroneous.

The fifth prayer assumes that Grafflin delivered the goods under the contract between Radde and the Phosphate Company. There was no evidence to go to the jury on that point.

The eighth prayer was that Grafflin lost his lien by delivery. This is conceded to be correct, but the point is not in issue. Grafflin is not suing on his title, but on his contract. His contention is that the moment his lien was lost his contract came into existence.

The case is more one of pleading than of substantive law.

The title of Grafflin in the goods was beyond dispute. Either he passed his title to the Phosphate Company, as vendee, for the invoice prices, and the company took as vendee, *or it is a trespasser, and is liable in trover for the goods.*

Sheperd *v.* Harrison, 5 H. L., 116.

Daws *v.* The Bank, 91 U. S., 633.

In Sheperd *v.* Harrison, just cited, Lord Cramworth said that the invoices were evidence of the value of the goods converted.

But a party has an election to waive a tort and sue upon an implied promise.

McCullough *v.* Roots, 19 How., 333.

Under the Code of Procedure in South Carolina it seems that on the pleadings in this case Grafflin could recover for a conversion.

Code of Procedure, sec. 192.

INTEREST.

The courts in South Carolina, in earlier times, leaned against the right to interest. It has been held that on merchants' accounts or open accounts interest could not be recovered. The present case is not within that rule. The later decisions have been more liberal.

"The general rule is to allow interest "*eo nomine*" only on money-demand certain, or capable of being reduced to a certainty, or payable at a definite time, either expressly or impliedly."

Anerum *v.* Slone, 2 Speer, 594.

Interest was allowed on a contract to purchase land at a foreclosure sale.

Childs *v.* Trazee, 15 So. Ca., 612.

So on a purchase at sheriff's sale.

Arnold *v.* House, 12 So. Ca., 600.

So interest is allowed as damages in an action against a carrier for the loss of goods.

Kyle *v.* R. R. Co., 10 Rich, 362.

See, also, Kennedy *v.* Barnwell, 7 Rich, 124.

But this case belongs to the domain of general commercial law, and this court will apply that law.

Watson *v.* Tarpley, 18 How., 517.

Olcot *v.* Supervisors, 16 Wall., 678.

Boyce *v.* Tabb, 18 Wall., 546.

CHARLES NEPHEW WEST,
JAMES LOWNDES,
For Defendant in Error.

114-492

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.—No. 256.

THE ATLANTIC PHOSPHATE COMPANY, PLAINTIFF IN ERROR,

vs.

J. C. GRAFFLIN, DEFENDANT IN ERROR.

REPLY.

1

I.

AS TO THE ALLEGED DEFECTS IN THE BILL OF EXCEPTIONS.

The general rule undoubtedly is, "that each Bill of Exceptions must be considered as presenting a substantive case, and it is on the evidence stated in itself alone that the Court is to decide."

2

But there are other modes of bringing the evidence into the record. This may be accomplished "by appropriate reference in the bill to other parts of the record," 104 U. S., 554, by an agreed statement of facts, or a special finding, in the nature of a special verdict, 112 U. S., 502.

In the case at bar the evidence relied on is printed in the record, and to it is appended an agreement of counsel, f. 76, that the testimony thus presented "was the testimony given at the hearing." The evidence thus brought into the record by agreement of counsel contains only such matter as is necessary to explain and point the exceptions, all irrelevant

3

matter having been eliminated. This is a substantial if not a technical compliance with the rules in accordance with which Bills of Exceptions should be framed.

II.

ON MERITS.

4 But even if the evidence be excluded, still sufficient appears on the record to entitle the plaintiffs in error to a reversal of the judgment of the Circuit Court.

The pleadings and the instructions given to the jury are properly before this Court.

The record shows that this action was *indebitatus assumpsit* for goods sold and delivered, and that the jury were instructed that in this action the plaintiff might recover not the value of the goods, but the amount of the advances made by him to a third person, the real vendor, to enable him to purchase the

5 goods.

The issue raised by the pleadings was not submitted. The issue submitted was not made by the pleadings, and could not have been made by any pleading in the action.

The argument of respondent's counsel frankly admits that in this respect "the charge is open to criticism," but it is suggested that the tenor of the instructions shows that the word "advances" in the closing sentence was used as synonymous with "invoice prices."

We do not think the instructions are susceptible of this

6 construction. An analysis of the charge shews that it rests on the theory that the invoices in the possession of the Company were constructive notice of the amount of the advances made by Grafflin to Radde—that the Bills of Lading in their possession were like notice that he was the owner of or had a lien on these cargoes to the extent of these advances—that the acceptance of the goods with this notice raised an implied promise on the part of the Company to pay these advances, which could be enforced in this action, though the jury believed that in fact the goods had been purchased, not from

7 the plaintiff, but from Radde, and had been delivered to the Company under Radde's contract.

Surely instructions framed in accordance with this theory, which ignores every ingredient in the cause of action and all the matters of defense, cannot be sustained.

We do not deny, as respondent's argument seems to assume, that contracts of sale, like all other contracts, may be implied from circumstances. Nor do we deny that the jury under proper instructions might have implied such a contract from the facts and circumstances set out in detail in respondent's 8
brief, (page 9.) All that we claim is that the decision of that question depended on various facts, of whose effect the jury were the judges, and the consideration of which was withdrawn from them by the charge.

It is said "that the implication of a promise from the facts in this case is the stronger because the transaction is one of constant occurrence in commerce. Most of the sales of commerce are conducted on credit, and *the method of securing the lender is precisely the one used in this case.*"

We think the statement contained in that portion of the 9
extract which we have italicised is clearly erroneous. The usual course in cases like the present is for the shipper to draw upon the vendee in favor of the person making the advances, and to forward the draft, with the Bill of Lading annexed, to the payee. Where this was done, and the draft and Bill of Lading were forwarded to the vendee, who refused to accept the draft, but retained the Bill of Lading, the delivery of the Bill of Lading to the vendee was held to be conditional, and the vesting of the property subject to a defeasance if the consignee refused to accept the draft.

But in the case at bar no draft was annexed to the Bills of 10
Lading, and these, though originally to the order of Grafflin, were endorsed by him and delivered to Radde's agent, for the express purpose of enabling him to deliver the goods under his contract, and the delivery of the goods to the Phosphate Company was unconditional.

Sheperd *vs.* Harrison will not, therefore, help the respondents. What they need is a case in which it has been held that one who holds a draft, with Bill of Lading, drawn against a consignment of goods, and who consents to an uncondi- 11
tional delivery of the goods to the consignee, may, if accept-

ance of the draft is subsequently refused, bring an action for goods sold and delivered, and recover in that action a judgment against the consignee upon an implied acceptance of the draft.

III.

It is said (page 10) that the third prayer of the Phosphate
12 Company was properly refused because "Grafflin under the Bill of Lading took a complete legal title."

It will be seen by reference to the prayer, f. 80, that the Court was asked to instruct the jury that "if from the evidence they were satisfied that Grafflin received the Bills of Lading as security for his advances, then," &c., &c.

There was certainly evidence to prove this. Grafflin testified: "The cargoes were the security I had for the liability." "I loaned my credit on commission; that was all my interest in these cargoes." ff. 29 and 32.

13 In no sense can it be said that Grafflin "took a complete legal title," if by that he meant the absolute ownership of the cargoes. It is clear that they were shipped by Radde for the purpose of completing his contract with the Phosphate Company, and that it was his intention to pass to them the general property, subject to Grafflin's right to retain possession of the goods until the purchase money was paid, and if payment was refused, to sell the goods to any one else, and pay himself out of the proceeds.

Jenkins vs. Brown, 14 Q. B., 496.

14 Mirabita vs. Imperial Ottoman Bank, 3 Ex. D., 164.

His legal relation to these cargoes was perfectly well understood by the plaintiff, for in his letter to Pelzer, Rodgers & Co., f. 59, he says: "I could not have taken Radde's place in his contracts with you without your consent. In buying the cargoes by taking an assignment of the Bills of Lading, I did not buy or assume the contract. I could have sold the cargoes to any one I pleased, leaving you to your remedy against Radde for breach and I could have detained
15 the cargoes until payment by you on delivery. And now, because I have not sold the cargoes to others, but have

delivered them without payment, is it possible that you will hold that I have injured myself by my confidence in you?"

IV.

The fifth prayer it is said "assumes that Grafflin delivered the goods under the contract between Radde and the Phosphate Company, and there was no evidence to go to the jury on that point." 16

Grafflin testifies, f. 32: "The documents came to me through Brown, Shipley & Co. I handed them over to Dunan to carry out his agreements." What agreements? Clearly the contracts made by him as Radde's agent with the Phosphate Company. Again, in his letter to Pelzer, Rodgers & Co., f. 55, he says: "Mr. Dunan, who then becomes my agent for the realization of the draft," (collection of the purchase money,) "*by my consent proceeds to permit deliveries of his cargoes in honor of Mr. Radde, without requiring cash before delivery.* I I take Radde's cargoes off his shoulders and honor *his sale.*" 17

V.

The eighth prayer is in these words: "That if Grafflin had a lien on these cargoes for his advances to Radde, and parted with the goods without having any agreement with the Atlantic Company to pay his advances he has lost his lien, and must look to the party to whom he advanced for redress."

This is conceded to be correct, page 11, but it is said the point is not in issue.

We admit that it was not and could not properly be in issue in the case made by the pleadings. 18

It was however in issue in the case which the Circuit Court permitted the plaintiff to make on the trial, against the earnest protest of the defendant, and to which alone the instructions given to the jury were applicable.

VI.

INTEREST.

The record shows that the jury having found a verdict for $15,450.42, the verdict was recommitted to them, with positive instructions to add interest to the amount found for the plaintiff. 19

Was this error?

The answer to this question depends upon the law of South Carolina.

In Barrow *vs.* Reab, 9 How., 368, this point was expressly ruled. In that case Reab had purchased from Barrow 35,000 gallons of molasses, which were not delivered according to contract. An action was brought for damages. The ques-
20 tion arose whether plaintiff was entitled to recover *interest.* This Court said:

"Independent of the rule elsewhere, the law in Louisiana must, in this instance, govern in respect to interest; and we have before shown it sustains the course adopted by the Circuit Court."

We have already said that the complaint in this case contained only what under the old common law pleadings was known as "the common counts for goods sold and deliv-
21 ered," and we have cited in our opening argument, page 18, the South Carolina decisions, to show that in that State, in an action like this, interest cannot be recovered as a legal incident of the contract.

Those decisions were not upon "merchant's accounts" or "open accounts," but upon the precise point we are now considering.

It is said "that the later decisions have been more liberal." Respondent's Argument, page 12.

The first case cited to sustain this view is Ancrum *vs.* Sloan,
22 2 Speer's L. R, 594.

That was an action for breach of warranty. The jury were instructed if they found for the plaintiff they might allow interest from the day of sale. On appeal this ruling was held erroneous.

In the decision the Court, reviewing previous decisions, say:

"It is necessary to the allowance and estimate of interest to ascertain the sum due and the time when payable. Accordingly, all engagements, or acknowledgments in writing, expressing the sum due and the time of payment, have been
23 recognized as *liquidated* demands, and on them it has been permitted to recover interest by way of damages. Interest

also has been allowed on liabilities to pay money, though not in writing, if the sum is certain or capable of being reduced to a certainty, from the time when, either by the agreement of the parties, or the construction of law, the payment was demandable, as in cases of money had and received, paid for the use of another or by mistake, or on an account stated, *and on open accounts by express agreement;* and when by the course of dealing between the parties or the usage of trade such agree- 24
ments may be inferred. Open accounts do not bear interest, though the sum is certain, because by custom the credit is indefinite. It is not recoverable on a *quantum meruit* for work and labor nor *quantum valebat* for goods sold, nor on a verbal contract to pay a certain sum for rendering a service."

This decision was rendered in 1844.

In the same volume of the reports, 2 Spear's L. R., 31, will be found Lindsey *vs.* Bland, where in an action for goods sold and delivered, the plaintiff was allowed to recover interest, *upon the special ground, however, that by the terms of sale the goods* 25
were to be paid for in a security which, when due, would bear interest.

DeGroot *vs.* Darby, 7 Rich, 120, was decided ten years later (1854.) In that case "the plaintiff merely counted for goods sold and on the money counts. There was no count in the declaration for interest. The Circuit Judge instructed the jury "that the plaintiff could not recover interest, as he had no count in his declaration on a promise to pay interest. On appeal a new trial was refused. In its decision the Court uses the language which will be found at folio 69 26
of our opening argument.

The next case cited is Childs *vs.* Trazee, 15 So. Ca., 612. In that case interest was allowed on a contract to purchase land at a foreclosure sale upon the special ground that the order of sale required the purchaser to pay *cash.*

In Arnold *vs.* House, 12 S. C., 600, interest was allowed on a purchase at Sheriff's sale. The ground for the decision is thus stated:

"The Sheriff at his sales may be regarded the agent of both parties, and his entry a *liquidation* of the sum bid. The sum 27
is thus rendered certain."

In Devereux *vs.* Taft, 20 S. C., 555, (1883), the Court held "that accounts secured by mechanic's lien are like other open accounts, unliquidated, and do not bear interest."

In the case at bar the several counts in the complaint allege that the defendant is indebted to the plaintiff in the sum of dollars, and interest thereon, but they do not nor does either of them allege any agreement to pay interest
28 or any facts from which such an agreement could be inferred.

But the Court did not instruct the jury to allow interest if there was an agreement, express or implied, to pay it.

The interest was treated as a legal incident of the contract, independent of any agreement between the parties.

Samuel Lord

For Plaintiffs in Error.

114 — 001

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 252.

THE NEW ORLEANS, SPANISH FORT, AND LAKE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE DELAMORE, J. R. ALCIE GANTHREAUX, CIVIL SHERIFF OF THE PARISH OF ORLEANS, AND THE CIVIL SHERIFF OF THE PARISH OF ORLEANS, SUCCESSOR OF THE PARISH OF ORLEANS UNDER THE CONSTITUTION OF 1868.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED AUGUST 2, 1882.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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1 *Petition. Filed December 6th*, 1879.

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans.

NEW ORLEANS, SPANISH FORT AND LAKE RAIL*road* Co.
vs.
GEORGE DELAMORE *et al.* } No. 10324.

To the honorable the judge of the fifth district court for the parish of Orleans:

The petition of the New Orleans, Spanish Fort and Lake Railroad Company, a corporation created under the general law of the State of Louisiana, having its domicile in the city of New Orleans, and represented herein by its president, Moses Schuartz, respectfully shows:

That one George Delamore, of the city of New Orleans, having obtained judgment in this honorable court in the suit entitled George Delamore *vs.* New Orleans, Canal Street, City Park and Lake Railroad Company, numbered 10213 of the docket, has caused execution therein to issue, and the civil sheriff of the parish of Orleans to seize and advertise to be sold the following described property, to wit:

2 1st. All and singular the right of way, the powers, privileges, immunities, and franchises conferred and granted by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of an ordinance of the city of New Orleans, being number 4523 of the administrative series, adopted by the common council of the city of New Orleans on the twenty-first of May, 1878, as will more fully appear, as -tated in said advertisement, by reference to the authentic copy of said ordinance on file in the office of said civil sheriff.

2nd. All and singular a certain frame building or structure known as a pavillion, being on the Bayou St. John, at or near the entrance thereto in Lake Pontchartrain, said building being now occupied by O. Faccecn as a refreshment saloon, with small houses attached.

Now, petitioner shows that none of said property is the property of said Canal Street, City Park and Lake Railroad Company; that all the right of ways, powers, privileges, immunities, and franchises described in said ordinance, numbered 4523, had, long before the date of said ordinance, been granted

3 and conferred on another corporation, also bearing the name of "Canal Street and City Park and Lake Railroad Company," by the common council of the city of New Orleans, by ordinance number 2264, adopted August 5th, 1873; 2548, adopted March 24th, 1874; 3146, adopted June 15th, 1875, and by other ordinances. That said last-mentioned corporation became and was adjudicated a bankrupt under the bankruptcy laws of the United States in the cause entitled Edward R. Hampson *et als. vs.* The City Park and Lake Railroad Company, No. 1531 of the bankruptcy docket of the district court of the United States for the district of Louisiana, and

all the said right of way, powers, privileges, immunities were therein surrendered, and were, under orders of said court, legally sold.

That the purchaser at said sale was Thomas H. Handy, who subsequently transferred the property so bought by him to a corporation, organized subsequently to the date of said purchase, called the "Canal Street, City Park and Lake Railroad Company," the
4 same being the judgment debtor in the aforesaid cause, wherein George Delamore is plaintiff, and numbered 10213 of the docket of this honorable court, the said company assuming the mortgage given by said Handy, containing the (*factum de non alienando*), for a part of the purchase price of said property, and bearing upon all the property purchased by said Handy at the said bankruptcy sale & *als.*

That under proceedings had in this honorable court in the suit entitled Mrs. Elizabeth Stratman *et als. vs.* Thomas H. Handy, numbered 9486 of the docket, the said property was seized and was sold by the civil sheriff, and was bought by Moses Schuartz, who has since sold the same unto your petitioner.

And petitioner also alleges that no rights whatsoever were acquired by the said Canal Street, City Park and Lake Railroad Company under or by virtue of said ordinance numbered 4523, as against the mortgagees of said property, or against any person acquiring under the mortgage then existing on said property, or any person subsequently acquiring said property, and especially your peti-
5 tioner; that said ordinance, if it had any effect whatsoever, enured to the benefit [of] said mortgagees, and finally to your petitioner, who acquired through said mortgagee.

And your petitioner further says that he is the owner of the certain frame building seized in said suit, the same being one of the fixtures and improvements situated on and attached to the portion of ground, situated in the second district of the city of New Orleans, at the mouth of, and on the left bank of the Bayou St. John, and on the margin of Lake Pontchartrain, acquired by petitioner from Vincent Micas, by act, before Jno. Berdanagel, notary public, on the —— day of ——, 1879, and more fully described in said act, a certified copy of which is filed herewith as part of this petition; that the said Canal Street, City Park and Lake Railroad Company has no ownership, right, or interest therein.

And petitioner says further, that none of the said property seized by the said George Delamore, and by the civil sheriff advertized to be sold, is in any manner liable to the satisfaction of the judgment and writ as aforesaid against said Canal Street, City
6 Park and Lake Railroad Company; that the said seizure and advertisement were done with the wicked and malicious motive of injuring the credit of good name of petitioner, and of slandering petitioner's title to said property; that said advertisement has been repeated, notwithstanding due notice and demand on the civil sheriff, according to law, and without said civil sheriff having acquired and obtained a bond to secure him against damages, as he is authorized to do by law; that said seizure and advertisement have greatly damaged petitioner, in causing its title to said

property to be questioned and brought into disrepute; in injuring its credit, and putting it to the expense of counsel to secure the protection of the court.

That should said unlawful seizure and advertisement continue, further and greater injury will be inflicted upon petitioner; that having demanded, &c., lease of said property, and its release having been refused, petitioner, according to his belief, has no relief except by writ of injunction, and the same is necessary.

7 Petitioner represents that he has suffered damages from the cause hereinbefore mentioned, in the full sum of five thousand dollars, for which the said Delamore is liable.

Wherefore, reserving his right to demand in another suit damages from the civil sheriff of the parish of Orleans for advertising the said property to be sold, after demand from its release had been made, and without the said sheriff having exacted bond and assigned same as authorized by law, petitioner prays, the annexed bond and affidavit considered, that a writ of injunction issue, directed to J. R. Alcee Gauthreaux, civil sheriff of the parish Orleans, and to said George Delamore, forbidding and restraining them, or either of them, from advertising, or selling, or offering for sale, all or any of the property following:

The right of way, franchises, privileges, immunities, or franchises conferred or granted by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of an ordinance of the city of New Orleans, being numbered 4523

8 of the administration series, adopted by the common council of the city of New Orleans, on the 21st day of May, 1878, and the certain frame building or structure, known as a pavillion, situate on the left bank of Bayou St. John, at or near the entrance of Lake Pontchartrain, and now occupied by O. Taucon, as a refreshment saloon, with small houses attached.

Petitioner prays, also, that said J. R. Alcee Gauthreaux, civil sheriff of the parish of Orleans, and said George Delamore be duly cited, and that, after due proceedings had, petitioner have judgment against said defendants perpetuating said injunction; and have further judgment against said George Delamore for damages, in the sum of ten thousand dollars ($10,000), with interest from judicial demand.

Petitioner prays also for costs and for all general relief.

(Signed) CHAS. S. RICE,
Of Counsel.

9 *Affidavit.*

Personally appeared Moses Schuartz, who, being duly sworn, deposes and says: That he is the president of the New Orleans, Spanish Fort and Lake Railroad Company, plaintiff in foregoing petition, and that all and singular the allegations in said petition are true.

(Signed) M. SCHUARTZ.

Subscribed and sworn to before me, this 5th day of December, 1879.

(Signed) ROBERT J. KER, *Not. Pub.*

Bond. Filed December 6th, 1879.

Know all men by these presents, that we, New Orleans and Spanish Fort Railroad Company, as principal, and Louis Schuartz, as security, of the city of New Orleans and State of Louisiana, are held and firmly bound unto George Delamore and the civil sheriff of the parish of Orleans, or either, their heirs, executors, in the sum of twenty-five hundred dollars, lawful money of the United States of America, to be paid to said George Delamore and said civil sheriff, or either, their heirs, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, administrators, firmly by these presents. Sealed with our seals, and dated the 6th of December, in the year of our Lord 1879.

Whereas the said New Orleans, Spanish Fort and Lake Railroad Company has presented a petition to the honorable the fifth district court for the parish of Orleans, praying a writ of injunction to issue:

Now, the condition of the above obligation is, that we, the above-bound New Orleans, Spanish Fort and Lake Railroad Company and Louis Schwartz, will well and truly pay to the said George Delamore and said civil sheriff, the defendants in said writ of injunction, all such damages as he or they may recover against us, in case it shall be decided that the injunction was wrongfully obtained.

(Signed) NEW ORLEANS, SPANISH FORT AND L. R. R. CO.

M. SCHUARTZ, *President*. [SEAL.]

(Signed) LOUIS SCHUARTZ. [SEAL.]

Order.

Let a writ of injunction issue as within prayed for, and according to law, upon the petitioner giving bond, with good and solvent security thereon, in the sum of two thousand five hundred dollars ($2,500.00), conditioned as the law directs.

New Orleans, La., Dec. 5th, 1879.

(Signed) W. H. ROGERS, *Judge*.

Writ of Injunction.

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans. The State of Louisiana.

N. O., SPANISH F. & L. R. R. Co. *vs.* GEORGE DELAMORE *et als.* } No. 19324.

To J. R. Alcee Gauthreaux, civil sheriff of the parish of Orleans, and George Delamore, Greeting:

You are hereby enjoined, restrained, and forbidden, in the name of the State of Louisiana, and of the fifth district court for the parish of Orleans, from advertising or selling or offering for sale all or any of the property following:

The right of way, powers, privileges, immunities, and franchises conferred and granted by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company under and by virtue of an ordinance of the city of New Orleans, being number 4523 of the administration series, adopted by the common council of the city of New Orleans on the 21st day of May, 1878, and the certain frame building or structure known as the pavil*l*ion, situate on the left bank of Bayou St. John, at or near the entrance thereof into the Lake Pontchartrain, now occupied by C. Faucen as a refreshment saloon, with small houses attached. And you do in the premises, you make return thereof, together with the writ, to our said court, as the law directs.

Witness the Honorable Walter H. Rogers, judge of our said court, this 6th day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and the 104th year of the Independence of the United States.

(Signed) PAUL T. ABADIE, *Dy Clerk.*

13 *Exception. Filed 18th December*, 1879.

N. O., SPANISH FORT AND LAKE R. R. Co. } No. 10324.
vs.
GEORGE DELAMORE *et als.*

Now comes defendant, George Delamore, and for exception pleads—

1st. That the petition of plaintiff shows no cause of as action as to ownership of franchises seized and case of which said plaintiff has enjoined.

2d. That your exceptor is entitled to oyer of the averred title to the frame building seized.

Wherefore he prays his exception be maintained, and if the second ground of exception is not complied with in five days, that plaintiff's suit be dismissed.

(Signed) W. S. BENEDICT, *Att'y.*

Notice of Trial of Exceptions.

STATE OF LOUISIANA:

Fifth Dist. Court for the Parish of Orleans.

NEW ORLEANS, *February 7th*, 1880.

N. O., SPANISH FORT & L. R. R. Co. } No. 10324.
vs.
GEORGE DELAMORE *et als.*

14 To N. O., Spanish Fort & L. R. R. Co., through Chas. S. Rice, att'y-at-law.

SIR: Please to take notice that the exception filed in the above-entitled case is fixed for trial on Wednesday, the 18th day of February, 1880, at 11 o'clock a. m.

(Signed) JNO. J. HANNAN, *Dy Clerk.*

Order Exception Cont.

Extract from the Minutes.

WEDNESDAY, *February 18th*, 1880.

N. O., SPANISH FORT & L. R. R. Co. *vs.* GEORGE DELAMORE & *al.* } No. 10324.

The exception herein is continued till Thursday, the 26 instant at 11 o'clock a. m.

Exception Referred to Merits.

Extract from the Minutes.

THURSDAY, *Feb'y 26th*, 1880.

N. O., SPANISH F. & L. R. R. Co. *vs.* GEORGE DELAMORE & *al.* } No. 10324.

The exception herein came on this day for trial.

Chas. S. Rice, for plaintiff, Breaux, Fenner & Hall & W. S.
15 Benedict, for defendant; when, after hearing pleadings and counsel, for the reasons orally assigned in open court it is ordered that said exception be referred to the merits, upon the defendant filing answer on Monday next.

Answer. Filed Feb'y 27th, 1880.

N. O., SPANISH FORT & L. R. R. Co. *vs.* GEORGE DELAMORE *et al.* } No. 10324.

Now into court comes George Delamore, and for answer to plaintiff's petition pleads a general denial to each and every of the allegations thereof not hereinafter specially admitted; and, further answering, he avers that true it is he has judgment against the Canal Street, City Park and Lake Railroad Co., and under execution thereon has seized herein on the frame building described in said seizure, and the rights and franchises therein described, when he was illegally enjoined herein, for which he reserves his right to damages.

Wherefore he prays judgment for defendant, with reconvention of his right to damages and for costs, and all general and equita-
16 ble relief.

(Signed) W. S. BENEDICT, *Att'y.*

Order Fixing Case.

Extract from the Minutes.

THURSDAY, *March 11th*, 1880.

N. O., SPANISH F. & L. R. R. Co. *vs.* GEORGE DELAMORE *et als.* } No. 10324.

On motion of W. S. Benedict for defendant—

It is ordered that this cause be fixed for trial on Friday, the 19th

instant, at 12 o'clock m., and that Chas. S. Rice & Breaux, Fenner, & Hall be notified hereof.

17 *Notice of Trial.*

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans.

N. O., SPANISH F. AND L. R. R. Co. *vs.* GEORGE DELAMORE & *al.* } No. 10324.

To Breaux, Fenner & Hall, and Chas S. Rice, att'ys-at-law:

Please take notice that the above-entitled case is fixed for trial on Friday, the 19th day of March, 1880, at 12 o'clock m.

(Signed) JNO. J. HANNAN, *Dy Clerk.*

Subpœna Duces Tecum.

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans.

N. O., SPANISH FORT & L. R. R. Co. *vs.* GEORGE DELAMORE & *al.* } No. 10324.

To the New Orleans and Spanish Fort R. R. Co., through its proper officer:

You are hereby commanded, in the name of the fifth district court for the parish of Orleans, to bring with you and produce in open court, on Friday, the 19th day of March, 1880, at the hour
18 of 11 a. m., to be used in evidence in the above-entitled case by the defendants therein, the plans of survey of the Spanish Fort property and contiguous tracts, made by W. H. Bell, surveyor. And herein you are not to fail, under penalty of the law.

Witness the Hon. Walter H. Rogers, judge of the said court, this 15th day of March, 1880.

(Signed) J. J. HANNAN, *Dy Clerk.*

Order and Continuance.

Extract from the Minutes.

FRIDAY, *March 19th*, 1880.

N. O., SPANISH F. & L. R. R. Co. *vs.* GEORGE DELAMORE & *al.* } No. 10324.

This case is continued until Saturday, the 27th instant, at 12 o'clock m.

Order and Continuance.

Extract from the Minutes.

SATURDAY, *March 27th*, 1880.

N. O., SPANISH FORT & L. R. R. Co. *vs.* GEORGE DELAMORE *et al.* } No. 10324.

This case is continued till Saturday, April 3d, 1880, at 12 o'clock m.

19 *Testimony. Filed April 3d*, 1880.

N. O., SPANISH FORT AND LAKE RAILROAD Co. *vs.* GEORGE DELAMORE & *al.* } No. 10324.

NOTE.—Mr. Price, counsel for plaintiff, offers in evidence the record in the suit entitled George Delamore *vs.* The Canal Street, City Park and Lake Railroad Company, No. 10213 of the docket of this court, and offers specially the petition, the judgment, the execution, the writ of *fi. fa.*, with the proceedings had thereon in the sheriff's office, including the advertisement, a copy of which is filed and marked "A"; also offers in evidence copy of the charter of the first corporation, styled The Canal Street, City Park and Lake Railroad Company, which act of corporation was passed before Buisson, notary public, May 19th, 1873, copy marked "C" now filed; also offers *pro forma* the record in the case of ——— ——— *et als. vs.* The Canal Street,

20 City Park and Lake Railroad Company, No. 1531, of the bankruptcy docket of the United States district court for the district of Louisiana, especially the petition for the sale of the property, filed therein, copy of which is produced and marked "B"; and filed also, order rendered in the same cause directing the sale, copy of which is produced and marked "D"; also, the order rendered in the same cause fixing the terms and conditions of the sale, copy now produced and marked "E"; also, order of same court confirming the sale, copy produced and marked "F"; also, a copy of the advertisement of sale of the property under the order of court, copy produced and marked "M"; also, a copy of the process-verbal of sale in the same cause by the master, now produced and marked "N"; also, certified copy of the city ordinance 2264, A. S., now produced and marked "P"; also, like copy of ordinance 3146, A. S., now produced and marked "Q"; also, certified copy of the act of sale under order of the United States court to Thomas H. Handy, produced and marked "G"; a certified copy of the act of sale of the same property from Thomas H. Handy to the Canal Street, City Park and Lake Railroad Company, produced and

21 marked "H"; record in the suit of Stratman and *als. vs.* Thomas H. Handy, No. 9486 of the docket of this court, especially the writ of seizure and sale, and the sheriff's return of the proceedings therein; copy of title of M. Schuartz & Bros., herewith produced and matted "I"; copy of act of sale by M. & L. Schuartz to the New Orleans, Spanish Fort and Lake Railroad Company, pro-

duced and marked "J"; copy of charter of New Orleans, Spanish Fort and Lake Railroad Company, produced and marked "L"; a certified copy of the act of sale, dated June 7th, 1879, by Vincent Micas to the New Orleans, Spanish Fort and Lake Railroad Company of what is known as the Spanish Fort property, copy produced and marked "R."

WM. H. BELL sworn:

Direct examination by Mr. RICE:

Question. What is your business?

Ans. Civil engineer and surveyor.

Question. How long have you been a civil engineer and surveyor?

Ans. Fifteen or twenty years.

22 Question. Are you acquainted with the property known as the Spanish Fort property?

Ans. I am.

Question. Examine the document which I present you and state what it is.

Ans. It is a survey I made of that property at the request of Mr. Micas.

Question. This plan which I show is made by you?

Ans. Yes, sir; and the survey also.

Question. When was that made?

Ans. I commenced that survey on May 17th, 1879; I set the lines as marked on the plan May 19th, 1879, and I finished the survey May 20th, 1879.

Question. And made the survey directly thereafter?

Ans. Yes, sir.

Question. It is made as the result of your survey?

Ans. It is a survey made according to the titles of deeds of sale.

Question. That were furnished you by Mr. Micas.

Ans. Yes, sir; he required that the survey should be made.

NOTE.—Mr. Rice offers in evidence the plan referred to as

23 a plan of the Spanish Fort property, marked "S."

Question. Mr. Bell, please point out of on this map where, if it appears thereon, is situated the pavill-on, which was occupied by old Taucon at the time this suit was instituted?

Ans. I cannot say who the pavillion was occupied by.

Question. You know the pavillion?

Ans. I know it is just near the bayou and outside of the line; the pavillion on this plan is designated by the letter L in red pencil mark.

Question. Now, Mr. Bell, please indicate on this map the boundaries proper of the Spanish Fort property.

Ans. According to the title? The Spanish Fort property, according to the title, is that portion of this plan which is colored green, on the south being bounded by a line crossing over the canal, on the south side of the canal, thereby embracing that part of the canal in the Spanish Fort property; it also includes the various build-

ings in that green space, with the rights of ac-retion—the rights of a front owner.

Question. The description of the property is that the east
24 side line is the line of the bayou?

Ans. Yes, sir; if I were to survey that property I would prolong the line on the side next to the bayou where questions would arise in regard to front rights.

Question. You would prolong the line, then, from the point marked "Y" in red pencil to the point marked "Z," and thence out to the point indefinitely in the direction of an arrow northward, and the same operation as to prolonging of the west line?

Ans. Yes, sir.

Question. Then, Mr. Bell, so drawn out, which side of that prolonged line is this pavillion?

Answer. Inside of the line, in front of the Spanish Fort property, and belonging to the Spanish Fort property; it is within the extension line.

Question. Now, Mr. Bell, does any portion of that pavillion rest on the ground?

Answer. I think about ten or fifteen feet; I have not measured it, but I think it rests on the ground about ten or fifteen feet.

Question. Now, the line which you have drawn shows that
25 there falls within the extended line a portion of ground some distance beyond the Spanish Fort proper-, on which the end of this pavillion rests, and that said ground extends even beyond: what is the character of that ground?

[Answer.] What has been thrown up in the operation of throwing open that bayou?

Question. How about on the lake side of that embankment; is there any formation that takes place there; I mean natural ac-retion?

Answer. Yes, sir.

Question. You say there are natural ac-retions there?

Answer. Yes, sir; every year.

Question. Which increase the width of that bank?

Answer. The lines of ac-retion marked on water-line last summer for nearly a week, the ground inside of the low-water line was easily to be valved over.

Question. Do I understand you that inside of the low-water line ac-retions are now forming?

Answer. Yes, sir; and every year they are forming.

Question. And this bank that is out of the water, in the neighborhood of this pavillion, is what?

Answer. That has been formed artificially by excavations of the canal.

26 Question. Well, has any portion of that been formed by ac-retions?

Answer. The bottom of that is probably like the balance of the lake around there, ac-retions. This property, twenty years ago, extended out to the lake, marked also Bulkhead; but the highest portion of it has been excavated, has washed away, and there are parts of it have been taken for filling up the orchard. About 51

years ago this property, which is the lake, the place between the lines of the stakes, made on the 19th of May, 1879, and the line Y Z prolonged, occupied by space of about 250 feet out, and also the general shore line, from time to time, that has washed away, and also portions of it have been excavated, for the purpose of filling up what is known as the orchard of the Spanish Fort property, and represented in the green space. Since 1831 the high-water mark of the lake has increased every year, so it is now 2½ feet higher than it was three (30) years ago.

Question. You spoke of making this survey under the direction of Mr. Micas; is that his letter of direction? (Witness handed letter.)

27 Answer. What is his request to me.

NOTE.—Mr. Rice offers in evidence the letter, marked "T."

By the WITNESS: After making this survey, Mr. Micas notified me that he had sold the property to Mr. Schuartz. I then turned over the surety to Mr. Schuartz, and the letter of instructions to make the survey.

Cross-examination by Mr. BENEDICT:

Question. Mr. Bell, look at that plan, and tell me whether or not the Spanish Fort property, as shown in the title of Mr. Vincent Micas, is fully shown in the green lines—the green space?

Answer. According to the title I have of Mr. Micas' purchase, and and also his sale to Mr. Schuartz, that is the boundary line given by the title. The title reads, fronting on Lake Pontchartrain. We cannot make a survey in the water. We always survey his place. We came to the front and gave that as a front line.

Question. Well, we are not speaking about riparian lines; we will come to that by and by. At the edge of the green space there comes the water, does it not?

28 Answer. Yes, sir.

Question. The prolongation of what is called the bayou line. There is a levee on each side of that bayou, is there not?

Answer. Yes, sir; an embankment.

Question. Do you call that private property, that embankment?

Answer. Anything that comes within the prolongation of the property lines of that property is private property; the bayou has its definite limits.

Question. Is that a natural or artificial stream?

Answer. Well, it is considered pretty well artificial now; the natural portion of it has been destroyed years ago by extending embankment and building out into it.

Question. Don't all natural streams have to be attended to for the interest of commerce?

Answer. Well, I don't know then how it is that they make skiffs and small crafts pay tollage, which could have entered that bayou without any artificial stream.

Question. Do you call the Mississippi River an artificial stream because vessels have to *pass* to pass through the jetties now?

29 Answer. Well, I don't know about the jetties. The steamers don't pay tollage there.

Question. Is there any more in the Bayou St. John as a natural stream than the Mississippi river?

Answer. I deem that the Bayou St. John is a natural stream.

Question. Do you know how many years ago that Spanish Fort building property was erected?

Answer. I have heard parties say that there has been a hotel building there for thirty or forty years.

Question. And the buildings within the line of Vincent Micas' have always been there, have they not?

Answer. The limits I found according to the title.

Question. Now you say these ac-retions have formed year by year in front of that property?

Answer. Well, the property extended out some 250 feet by the old map of 1832.

Question. And it has all been carted away and washed away?

Answer. And dug away.

Question. Therefore there has been no ac-retions formed?

30 Answer. Yes, sir.

Question. In other words, it is shifting sand?

Answer. Yes, sir.

Question. The front part of this pavillion in suit rests upon the embankment; what does the line part rest upon?

Answer. On the piling.

Question. And the piling driven on what?

Answer. In the water; in the bottom, covered with water at times, and at other times it is dry.

Question. Are you the surveyor and engineer of the Spanish Fort Railroad Company?

Answer. I am employed to do their work in that line; yes, sir; that is, at present.

Question. Did you sell that plan you have before you?

Answer. I sold that plan to Mr. Schuartz, having made it. Mr. Micas made the sale and referred me to Mr. Schuartz after the plan was made.

Question. Do you know who put up these buildings that we call the pavillion?

Answer. I do not, sir. I was not about in that neighbor-

31 hood at the time that was built.

Question. Do you know what became of the first Canal Street Railroad Company?

Answer. Well, yes, sir. I have a very vivid recollection of that; it got into the hands of the lawyers and the courts, and they squeezed it mighty. Your partner, Mr. Hornor, took it at that time.

By Col. Breaux:

Question. Mr. Bell, as I understand you to say, the water ebbs and flows from the low-water line to the land?

Answer. From the low-water mark on the map up to the green space the water ebbs and flows; high-water mark, of course, over-

flows the entire boundary to Meterie Ridge, but the ordinary ebb and flow is between those lines; that is, between low-water line and the line of the northwest boundary of the green space.

By Mr. BENEDICT:

Question. Is not Bayou St. John a navigable stream?

Answer. It is for vessels drawing six feet. Vessels drawing six feet can get over the bar at the mouth.

32 NOTE.—Mr. Rice offers in evidence especially the sheriff's return of the sale of this pavillion property, in the suit of Delamore against The Canal Street, City Park and Lake Railroad Company.

NOTE.—Mr. Benedict offers the charter of the Canal Street, City Park and Lake Railroad Company No. 2, copy to be produced; also offers from records, No. 1531, of the United States district court, the adjudication in bankruptcy of the Canal Street, City Park and Lake Railroad Company No. 1; also offers in evidence ordinance No. 4523, administration series, dated May 22d, 1878.

THOMAS H. HANDY sworn:

Direct examination by Mr. BENEDICT:

NOTE.—Mr. Benedict offers in evidence the date of recordation of the various acts of mortgage and sale that have been heretofore offered in evidence.

Question. Mr. Handy, were you connected with the first Canal Street, City Park and Lake Railroad Company?

Answer. I was, sir.

Question. What has become of that company?

Answer. It was sold out at marshal's sale.

33 Question. What became of the company, of the company itself, the corporation?

Answer. The corporation was dissolved, and made afterwards into a new corporation.

Question. The corporation was forced into bankruptcy in the United States court?

Answer. Yes, sir.

Question. That caused its dissolution?

Answer. Yes, sir.

Question. A new company was afterwards formed; were you connected with that company?

Answer. Yes, sir.

Question. Do you know Mr. Bell, the surveyor?

Answer. Very well.

Question. Do you know anything about his making a plan or survey of the pavillion said to be located near the Spanish Fort property?

Answer. He made a plan of the Spanish Fort property, and told me himself that this building was ten or twelve feet outside of the line.

Col. Breaux objects.

Question. How much of that pavillion is resting upon the ground?

Answer. Well, the history of that pavillion I can tell in a
34 very few words. It was started by Mr. Brott. He wanted to start in the ice cream business, and he put these out (as he said) ten or twelve feet beyond the line of the Spanish Fort. I stopped him then, because I was the president, not because he was building on our property, but simply because he was using our lumber. After this the railroad came through. Mr. Bell, who was then one of the directors of the company, put up a place for ladies and children to go in and swing, &c. After Mr. Schuartz purchased this property he was one day repairing the roof, and I told him he had made a mistake, that the property did not belong to him. He was under the impression he had bought it. Directly after that he purchased the Spanish Fort property from Micas, who was the owner of this property, and after that this suit of Delamore came up for the property, for the franchise, &c. But Mr. Brott was the originator of this pavillion, as it is called.

Question. Well, was the pavillion at the time of the existence of the first and second railroad company—was this pavillion
35 considered then the boundary-line of the Spanish Fort property?

NOTE.—Objected to. Objection sustained. Bill of exception reserved.

Question. Why did Mr. Brott start the erection of that building at the point that he did?

Answer. My understanding of it was that Mr. Brott started it because it was out in the water, and it would be an inviting place for women and children to go out and take ice cream. He was the vice-president of the company at the time I was its president.

Question. And you say you stopped his completion of it because he was using the railroad company's lumber?

Answer. Yes, sir.

Question. For his private purposes?

Ans. Yes, sir.

Cross-examination by Col. BREAUX:

Question. Who did complete that pavillion you speak of?

Answer. The second railroad company finally complete- it.

VINCENT MICAS sworn:

Direct examination by Mr. BENEDICT:

36 Question. Mr. Micas, did you sell the Spanish Fort property of Mr. Schuartz?

Ans. Yes, sir.

Question. Do you know the pavillion that was seized in the suit of Delamore against the Canal Street, City Park and L. R. R. Co., marked on the plan "S" by the letter X?

Answer. Yes, sir; that was occupied by Mr. Fauchon.

Question. There was this pavillion located as to the Spanish Fort property?

Answer. About 8 or 9 feet below the property that I sold. The Spanish Fort property that I sold; the titles will show what I bought and what I sold.

Question. Have you got the title under which you purchased?

NOTE.—Mr. Rice produces title.

By Mr. BENEDICT:

Question. Is that the date under which you purchased?

Answer. Yes, sir; I was there at the time Mr. Handy was made agent.

By Mr. RICE:

37 Question. What interest, Mr. Micas, have you, if any, in this suit?

Answer. I have nothing to do with it.

Question. Have you any interest in that pavillion?

Answer. No, sir.

Question. Don't you own the pavillion?

Answer. No, sir.

Question. Who does own it?

Answer. I don't know who bought it.

Question. You have no interest in it?

Answer. No, sir.

NOTE.—Mr. Rice offers in evidence on behalf of defendants the title of Vincent Micas, of the property derived from the sheriff, July 28th, 1876, in suit entitled Vincent Micas *vs.* The Canal Street, City Park and Lake Railroad Company, No. 7405 of the docket of the court, together with the petition and mortgage act thereto attached in that suit.

NOTE.—Mr. Benedict offers in evidence the plan referred to; also the plan by Castany and Sulles, of January 16th, 1866.

38 *Petition. Filed October 25th*, 1879.

Record. No. 10213. Offered in evidence by counsel for plaintiff.

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans.

GEORGE DELAMORE
vs.
CANAL STREET, C. P. & L. R. R. Co. } No. 10213.

To the honorable judge of the fifth district court for the parish of Orleans:

The petition of George Delamore, who resides in the parish of Orleans, with respect represents:

That he is the holder and owner of three certain promisory notes

made by the "Canal Street, City Park, and Lake Railroad Company," a corporation created under and by virtue of the laws of this State, and having its domicil in the parish of Orleans, said notes being made by and through Thomas H. Handy, its vice-president, in the absence of the president, and with full authority to its own order, and by it likewise endorsed, each of said notes being dated May 1st, 1878, and payable one year after date, for the following sum, viz:

39 One for the sum of twenty-three hundred & fifteen & $\frac{85}{100}$ dollars;

One for sixteen hundred and fifty dollars, and one for the sum of seventeen hundred and fifty-four $\frac{15}{100}$ dollars; in which sums, with interest and attorneys' fees of five per cent. said company is indebted unto petitioner; said notes being hereto annexed and made part hereof.

Petitioner further represents that in two several acts of mortgage passed before John Bendernagel, notary, dated September 14th, 1878, from which mortgage nothing has been realized, said company confessed judgment for the amount of said notes, with interest, and five per cent. attorneys' fees; said actsbeing annexed hereto as part hereof.

Amicable demand is alleged, and payment refused.

Wherefore petitioner prays defendant be cited herein, and, after due proceedings, that he do have judgment against said Canal Street, City Park and Lake Railroad Company in the full sum of five thousand seven hundred and twenty dollars, with eight per cent. per annum interest thereon from 1st May, 1878, with five per cent. attorney's fees, and all costs.

40 And he prays for all general and equitable relief.

(Signed) W. S. BENEDICT, *Att'y.*

Judgment.

Fifth District Court for the Parish of Orleans.

GEORGE DELAMORE
vs.
CANAL ST., CITY PARK & LAKE RAILROAD COMPANY. } No. 10213.

On motion of W. S. Benedict, of counsel for plaintiff, and on producing to the court due proof in support of said plaintiff's claim, the law and evidence being in his favor—

It is ordered, adjudged, and decreed that the judgment by default herein entered on the 7th instant be now confirmed and made final, and, accordingly, that there be judgment in favor of plaintiff, George Delamore, and against the defendant, the Canal Street, City Park and Lake Railroad Company, for the sum of five thousand seven hundred and twenty dollars, with eight per cent. interest per annum thereon from May 1st, 1878, until paid, five per cent. attorneys' fees, and costs of suit.

41 Judgment rendered November 11th, 1879. Judgment signed November 15th, 1879.

(Signed) W. H. ROGERS, *Judge.*

Fieri Facias.

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans.

To the sheriff of the parish of Orleans, Greeting:

We command you that by seizure and sale of the property, real and personal, rights and credits of the defendants, The Canal Street, City Park and Lake Railroad Company, in the manner prescribed by law, you cause to be made the sum of five thousand seven hundred and twenty dollars, with eight per cent. interest per annum thereon, from May 1st, 1878, until paid, five per cent. attorneys' fees, and also the sum of twelve $\frac{55}{100}$ dollars costs, as well as your own costs and charges, to satisfy a judgment rendered against the said defendant, Canal Street, City Park and Lake Railroad Company, in our fifth district court for the parish of Orleans, on the 11th day of November, 1879, in favor of plaintiff, George Delamore, and how you shall have executed this writ, you make return to our said
42 court (within seventy days) according to law.

Witness the Honorable Walter H. Rogers, judge of the said court, this 15th day of November, in the year of our Lord 1879.

(Signed) JNO. J. HANNAN,
Deputy Clerk.

Sheriff's Return.

Received November 15th, 1879, and on the 18th November, 1879, levied writ on the property described in the within annexed notice of seizure, marked A, which, with the return on the reverse of the same, is herewith made part of this return, carried the seizure of said property to be duly recorded in the office of the recorder of mortgages in and for the parish of Orleans, and no payment being made within the legal delay, said property was advertised for sale, announcing the sale to take place on the 6th December, 1879; said sale was stayed by a writ of injunction in the suit of New Orleans, Spanish Fort and Lake Railroad Company *vs.* George Delamore, &c., No. 10324 of the docket of this honorable court, and the delay within which this writ is made returnable by law having expired, I make this my return, still maintaining my seizure herein
43 made in full force and effect.

And at the time of returning this writ I requested the clerk of the honorable court to furnish me with a copy of the same, together with all my proceedings thereon endorsed, according to law.

No other property found after due demand made of plaintiff's attorney and defendants herein.

Returned January 23rd, 1880.

(Signed) ERNEST RICKER,
Deputy Sheriff.

Notice of Seizure. "B."

State of Louisiana, Sheriff's Office, Parish of Orleans. In the 5th District Court for the Parish of Orleans.

GEORGE DELAMORE
vs.
CANAL ST., CITY PARK & LAKE R. R. Co. } No. 10213.

To O. FAUCON:

Take notice that by virtue of a writ of *fieri facias* herein to me directed, I seize and demand of you the rent now due and which may hereinafter become due pending the seizure herein made, for the occupation of premises situated and known as a pavillion, being on the Bayou St. John, at or near the entrance thereto into the Lake Pontchartrain, commencing at a distance of eight feet from the lower boundary line of the Spanish Fort property, and extending thence toward the lake, which you will pay over to me.

(Signed) WM. J. GRADY,
Deputy Sheriff.

Notice of Seizure. "A."

In the Fifth District Court for the Parish of Orleans. Sheriff's Office, Parish of Orleans.

GEORGE DELAMORE.
vs.
CANAL ST., CITY PARK & LAKE RAILROAD Co. } No. 10213.

To Canal Street, City Park and Lake Railroad Company:

Take notice that I have seized, and in three days from the service hereof shall proceed to advertise and sell, according to law, the following-described property, to wit:

All and singular the right of way, the powers, privileges, immunities, and franchises conferred and granted by the city of New *of New* Orleans to the Canal Street, City Park and Lake Railroad Company under and by virtue of an ordinance of the city of New Orleans, being No. 4523 of the administration series, adopted by the common council of the city of New Orleans on the 21st May, 1878, as will more fully appear by reference to the authentic copy of said ordinance, on file in my office.

2d. All and singular a certain frame building or structure, known as a pavillion, being on the Bayou St. John, at or near the entrance thereto into the Lake Pontchartrain, commencing at a distance of eight feet from the lower boundary-line of the Spanish Fort property, and extending thence toward the lake a distance of sixty-nine feet; said building being erected upon piles driven into the Lake Pontchartrain, and said building being now occupied by O. Faucon as a refreshment saloon, with small house attached, to pay and satisfy the writ issued in this case, say the sum of $5,720.00, with interest and costs, unless the same is immediately paid.

(Signed) W. J. GRADY,
Deputy Sheriff.

46 *Sheriff's Return.*

Received November 18th, 1879, and on the 19th of November, 1879, served copy of the within notice of seizure on Canal Street, City Park and Lake Railroad Company, through D. B. Woods.

(Signed) W. J. McGEEHAN,
Deputy Sheriff.

Act of Mortgage, August 15th, 1878. *Marked "H." Filed 19th February*, 1879.

Sale of property, &c., Thomas H. Handy to Canal Street, City Park and Lake Railroad Company.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Be it known that on this fifteenth day of August, in the year of our Lord one thousand eight hundred and seventy-eight, before me, Jno. Bendernagel, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses herein named and
47 undersigned, personally came and appeared Thomas H. Handy, of this city, who declared that for the consideration and on the terms and conditions hereafter set forth he does by these presents grant, bargain, sell, convey, transfer, assign, set over, and deliver, with all lawful warranties as far as his own acts and deeds are concerned, with such title as was conveyed to him, and with full substitution and subrogation to all his rights and actions in warranty against all former owners and possessors, unto the Canal Street, City Park and Lake Railroad Company, of this city, herein represented by Thomas H. Handy, the vice-president of said company, duly authorized hereto by virtue of a resolution of the board of directors of said company adopted at their meeting held on the eight- day of July, 1878, a duly certified copy of which resolution is hereto annexed for reference, here also present, accepting and purchasing for the said company, and acknowledging due delivery and possession thereof, the following-described property, to wit:

1st. All and singular the right of way, powers, privileges, immunities, and franchises conferred and granted by the city of New Orleans to the late Canal Street, City Park and Lake Railroad
48 Company under an ordinance No. two thousand two hundred and sixty-four (2,264), addopted on the 5th day of August, 1873, by the council of the said city of New Orleans, and amended by ordinance No. two thousand five hundred and forty-eight (2,548), adopted March 24th, 1874, by said council, as will more fully appear by reference to the duly certified copies of the said ordinances annexed to an act passed before Joseph A. Quintero, notary, on the 26th January, eighteen hundred and seventy-eight.

2nd. The right of way, franchises, and privileges granted and conferred by said city of New Orleans through the following streets and avenues of the said city, viz: Commencing at the corner of Basin and Canal streets, and from thence down to Custom-House street, to Claiborne street, to Benville street, down Bienville street to St.

Patrick street, to Matarie road and Orleans avenue, down Orleans avenue and through City park to the Lake Pontchartrain; then along the lake shore to Spanish Fort, thence returning along the lake shore and through Orleans avenue to Bienville street, and
49 up Bienville street to Basin street, and thence on the neutral ground in Basin street to Canal street, the place of beginning.

3d. The right of way and franchises from the Spanish Fort to the shell road on the upper or west end of the new canal, and from said Spanish Fort to the town of Milneburg, with the right granted to said company to place their road on the revetment levee when the same shall be built by the city of New Orleans, the said franchises giving the right of way along the lake shore from Milneburg to the aforesaid shell road, or what is know as the new lake, and fully described in the said ordinance above referred to.

4th. The road-bed or tracks proper as now laid and constructed through the streets and avenues hereinbefore described, and comprising all the iron T-rail bars, spikes, cross-ties, grading from Canal street to the City park, the bridge at the lake, bridges along the road, plank crossings through the streets, ballast on road-bed, three turn-tables, frogs and switches, grading and embankments, from City park to the lake, and from the lake to the Spanish Fort, and extra curve works and turn-outs.

50 5th. The three dummies or engines known respectively as the "T. H. Handy," "Geo. F. Brott," and "W. H. Bell;" one Remmington dummy and two passenger cars.

6th. Two hundred and thirty-six (236) rails, more or less, averaging thirty-two tons; one pilot or cow-catcher, three (3) iron ash-pans, eight (8) iron frogs, four iron draw-heads, four (4) kegs of old iron, two (2) bundles of shingles, fifteen bundles of fish-plates or bars, four turn-table rollers, one turn-table centre plate, one keg of bolts, work-bench, and tool-house, &c.

7th. A certain square of ground situate in the Faubourg Jackson, in the second district of this city, in the square bounded by Custom-house, St. Patrick, Bienville, and Olympia streets, designated as square number sixty-three (63), on a plan drawn by John Schrieber, civil engineer, dated March 22d, 1863, and according to said plan said square measures three hundred feet front on each of said Custom-House and Bienville streets, and two hundred and ninety-seven feet front on each of said St. Patrick and Olympia streets, together with the fences, buildings, and improvements thereon, and all the rights, ways, privileges, servitudes, and appurtenances thereunto
51 belonging or in anywise appertaining.

Being the same property, appurtenances, rights, ways, privileges, effects, &c., which were acquired by said vendor, by purchase from John R. G. Pitkin, special master, acting by virtue of and pursuant to an order of the honorable the judge of the United States district court for the district of Louisiana, dated 31st May, 1877, rendered in the matter of Eduard C. Hampton *et als. vs.* Canal Street, City Park and Lake Railroad Company, in bankruptcy, numbered 1513 of the docket of said court, as per act passed before Joseph A. Quintero, notary, on the 26th of January, 1878. (Regis-

tered, C. O. Book 109, folio 367.) To have and to hold said property and appurtenances, &c., unto said purchaser, and its assigns, forever.

This sale is made and accepted for and in consideration of the price and sum of ninety thousand eight hundred and forty-eight $\frac{49}{100}$ dollars ($90,848.49), of which the sum of seventy-one thousand eight hundred and eighty-one 82½-100 dollars has been paid and settled for in the full paid up stock of said Canal Street, City
52 Park and Lake Railroad Co., the purchasers herein, and for the balance said Handy, vice-president, in behalf of said company, assumes in the lieu and stead, and to the discharge of said vendor, the payment of two promissory notes drawn by him to his own order, and by him endorsed, dated 30th of November, 1877, and made payable, each for the sum of nine thousand four hundred and eighty-three 33⅓-100 dollars, respectively, in one and two years after date, with interest at the rate of eight per cent. per annum from date, until paid and paraphed "*ne varietur*," by J. A. Quintero, notary, for identification with act passed before him on the 26th January, 1878, by which said vendor granted a mortgage to secure payment of said notes in favor of J. R. G. Pitkin, special master, as aforesaid, against the property herein conveyed, which mortgage is hereby assumed by said company, which settlement has been made in conformity to, and as set*h* forth in the agreement and stipulations embodied within article fourth of the charter of said company, passed before the undersigned notary on the 31st January, 1878.

And the said company hereby assumes and is bound to
53 carry out all the stipulations and agreements made by said Handy in the said act passed before J. A. Quintero, notary, on the 26th January, 1878.

And the said company hereby assumes the payment of all the taxes due and payable on said property. By an order of the United States district court, dated January 2d, 1878, the said property was sold to said Handy free of all encumbrances existing thereon for taxes, reserving the right of the State and city on the proceeds of the sale.

By reference to the certificate of the register and conveyances for this city, dated this day, and recorder of mortgages for this parish, dated this day, hereto annexed, it will appear that said property is free from all encumbrance in the name of said vendor, except the mortgage hereinbefore named, and B. 145, fo. 796. The general mortgage resulting from his bond under private signature as civil sheriff, dated December 5th, 1876, in favor of W. P. Kellogg, Governor of Louisiana, in the sum of $50,000, and that he has not heretofore alienated said property.

54 And said Handy bind himself to hold said company harmless from all damages, loss, or expense which may grow out of the recordation of said bond, and to cause the same to be cancelled and released, so far as said property herein conveyed is concerned, as soon as possible.

Thus done and passed in my notarial office, at New Orleans aforesaid, in the presence of Paul Reusch and John Medly, competent

witnesses, residing in this city, who hereunto subscribe their names, together with said parties and me, notary, on the day and date set forth in the caption hereof.

(Original signed) PAUL REUSCH.
JOHN MEDLY.
THOMAS H. HANDY.
THOS. H. HANDY,
Vice-President.
J. BENDERNAGEL,
Not. Pub.

I hereby certify the within and foregoing to be a true and correct copy of the original act on file and of record in my notarial office.

In faith whereof, I hereunto set my hand and seal, this 19th day of February, A. D. 1879.

(Signed) J. BENDERNAGEL,
Not. Public.

55 *Document "A." Filed April 3d*, 1880. *Offered in Evidence by Counsel for Pl'ff.*

Fifth District Court for the Parish of Orleans.

GEORGE DELAMORE
vs.
CANAL STREET, CITY PARK AND LAKE RAILROAD CO. } No. 10213.

By virtue of a writ of *fieri facias* to me directed by the honorable the fifth district court for the parish of Orleans, in the above-entitled cause, I will proceed to sell at public auction, at the Merchants' and Auctioneers' Exchange, Royal street, between Canal and Custom-House streets, in the second district of the city, on Saturday, December 6th, 1879, at 12 o'clock "m.," the following described property, to wit:

1st. All and singular the right of way, the powers, privileges, immunities, and franchises conferred and granted by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of an ordinance of the city of New Orleans, being No. 4523 of the administration series, addopted by the
56 common council of the city of New Orleans on the 21st of May, 1878, as will more fully appear by reference to the authentic copy of said ordinance on file in my office.

2d. All and singular a certain frame building or structure known as a pavillion, at or near the entrance thereto into Lake Pontchartrain, commencing at a distance of eight feet from the lower boundary line of the Spanish Fort property and extending thence toward, the lake a distance of sixty-nine feet; said building being erected upon piles driven into the Lake Pontchartrain, and said building being now occupied by O. Faucon as a refreshment saloon with small houses attached.

Seized in the above suit.

Terms, cash on the spot.

(Signed) J. R. ALCEE GAUTHREAUX,
Civil Sheriff of the Parish of Orleans.

57 *Document "B."*

In the Matter of EDWARD B. HAMPSON *et al.*
vs.
CANAL STREET, CITY PARK AND LAKE RAILROAD COMPANY, Bankrupt.
} In Bankruptcy. No. 1531.

To the Honorable E. C. Billings, judge of the district court of the United States for the district of Louisiana, sitting in bankruptcy:

The petition of James A. Shakespeare, of the city of New Orleans, herein appearing as the assignee in bankruptcy of the estate of the Canal Street, City Park and Lake Railroad Company, bankrupt, respectively represents:

That among the assets surrendered by the bankrupt and belonging to the aforesaid estate in bankruptcy there is the following described real estate and franchises situated in the State of Louisiana, in the parish of Orleans, to wit:

1st. A certain square of ground situate in the Faubourg Jackson, second district of the city of New Orleans, designated by the number sixty-three, on a plan drawn by John Schreiber, civil engineer, dated March 22, 1836, bounded by Custom-House St., Patrick, Bienville, and Olympia streets, and measuring three hundred feet
58 front on each of said Custom-House and Bienville, and two hundred and ninety-seven feet on each Olympia and St. Patrick streets, with buildings, etc., thereon.

2d. The railroad or track, all and singular built in pursuance of the charter of said company, and the various grants or privileges conferred upon said company by the city of New Orleans, and constructed through the following streets or avenues of said city, viz: Commencing at the corner of Basin and Canal street, and thence down to Custom-House street, and Custom-House street to Claiborne street, down Claiborne street to Bienville street, down Bienville street to St. Patrick, down St. Patrick street to Mestarie road and Orleans avenue, down Orleans avenue and through City Park to the lake shore to Spanish Fort, thence returning along the lake shore and through Orleans avenue to Bienville street, and up Bienville street to Basin street, and thence in neutral ground in Basin street to Canal street, including the road-beds of main tracks and branches, and all rights and appertenance of said railroad tracks, as well as rights of way thereto attached, together with the stations and other effects pertaining, and all the franchises and appurtenances of said Canal Street City Park and Lake Railroad Company.

59 Your petitioner further represents that the same hereinbefore described real estate is, as appears of record, encumbered and charged with the following hereinafter specified mortges, judgments, liens, and privileges resting thereon, to wit, the second of said properties: (1), the drainage privilege; (2), the one granted to Miss Lizzie Remy for $5,000; (3), the city of New Orleans for taxes, $180, and against said railroad, etc.; (4), privilege of John Clarke, $1,381; (5), privilege of Joseph Dainey, $1,177.45; (6), con-

When, it appearing to the satisfaction of the court that the service required by law has been duly made, and that the facts set forth in the petition were true—

It is ordered that the prayer of the petition be granted, the rule made absolute, and that the assignee be authorized to sell the surrendered property following, to wit:

1st. A certain square of ground situate in Faubourg Jackson, second district of the city of New Orleans, designated by the No. 63, on a plan drawn by Jno. Schreiber, civil engineer, dated March 22d, 1836, bounded by Custom-House, St. Patrick, Bienville, and Olympia streets, and measuring 300 feet front on each of said Custom-House and Bienville street, and 297 feet front on each Olympia and St. Patrick streets, with buildings, &c., thereon.

2nd. A certain portion of ground situate in the second district of this city of New Orleans, at the mouth of and on the left bank of Bayou St. John, and on the margin of Lake Pontchartrain, said portion of ground measuring, as per plan by Castaing & Belles, architects, annexed to an act passed before S. Magner, late a notary, dated 16 January, 1866, 797 feet 4 inches and 3 lines front on Bayou St. John; 419 feet front on Lake Pontchartrain; 631 feet 6 inches on the third line, and 348 on the fourth line, together with all the buildings and improvements thereon, rights, ways, customs, servitudes, and privileges thereunto belonging or in anywise appertaining, and known as the Spanish Fort.

3d. The railroads or tracks, all and singular, built in pursuance of the charter of said company, and the various grants and privileges conferred upon said company of the city of New Orleans, and constructed through the following streets and avenues of said city, viz:

Commencing at the corner of Basin and Canal streets, and thence down to Custom-house street, out Custom-house street to Claiborne street, and down Claiborne street to Bienville street, down Bienville street to St. Patrick street, down St. Patrick street to Metarie road and Orleans avenue, down Orleans avenue and through city park to the Lake Pontchartrain, then down to the lake shore to Spanish Fort; thence returning along lake shore and through Orleans avenue to Bienville street, and up Bienville street to Basin street, and thence in neutral ground in Basin street to Canal street, including the road beds of main tracks, as well as rights of way thereto attached, together with the stations and building pertaining, car fixtures, stock, and other effects pertaining, and all the franchises and appurtenances of said Canal Street, City Park and Lake Railroad Company. And in order to convey a clear and unencumbered title to the purchaser, it is further ordered, that after making the sale the assignees be also authorized to cause to be cancelled and erased from the books of the recorder of mortgages for the city and parish of Orleans, all mortgages, liens, privileges, and encumbrances standing against said property, and particularly the following, viz:

The second of said properties:

1st. The drainage privilage. 2d. The one granted Miss Lizzie

Remy for $5,000. Third. The city of New Orleans for taxes, $180, and against said railroad, &c. (4.) The privilege of Jno. Clark, $1,381. (5.) Privilege of Jno. Downy, $1,177.45. (6.) Contract and agreement between said company and Samuel Johnson. (7.)
67 Privilege of Gubernater & Terry, $160. (8.) Privilege of Com. J. Poitevant, $812.40. (9.) Privilege of W. G. Wilmot & Co., $275. (10.) Privilege of John Cook for $340.50. (11.) Privilege of John Cook, $138. (12.) Mortgage from New Albany Rail Mill Company, $19,772.73. (13.) Mortgage, favor Mr. Henry, $3,500. (14.) Privilege, favor Samuel Johnson, $30,000. (15.) Privilege of Frederick Schubber, $653.13. (16.) Privilege D. C. McCann, $1,378.05. (17.) The following privileges, viz:

W. H. Reynolds, $503 $\frac{33}{100}$; (18). R. W. Rogers, $1,002.40; (19), contract and agreement of said company and R. W. Rogers; (20), contract and agreement of said company with Daniel L. Stanton; (21), the privilege of B. D. Wood & Bro., $512; (22), of R. W. Rogers, $96.05; (23), of Hampsen, Whitehill & Co., $9,660.30; (24), of Lavin & Mackinson, $1,504.80; (25), of J. W. Adams, $400; (25), B. J. West, $152 $\frac{05}{100}$; (25), Mississippi Ship Timber and Lumber Wood Yard, $914.18; (28), Mississippi Ship Timber and Lumber Wood Yard, $933.74; (29), L. Hote & Co., $1,027.40; (80), the reinscription of the contract and agreement between said company and Samuel Johnson; (30), the lease of the St. John Hotel; (32), privilege of M. Soutes, $400; (33), of Wm. E. Amacke, $630.74; (34), of M. N. Apple-
68 gate, $453.08; (35), State taxes for 1875, $187.50; (36), city taxes for 1875, $187.50; (37), general mortgage in favor of W. H. Reynolds for $500; (38), also one in favor of city of New Orleans, $187.50; (39), one in favor of F. Rosenfeld, $440.29; reserving to the above-named parties, to all others in interest, all the rights in law to the proceeds of sale of said property, according to their rank and privilege, to be determined hereafter.

CLERK'S OFFICE.

A true extract from the minutes.
New Orleans, April 2nd, 1880.
(Signed) R. DEVONSHIRE, *Dy Clerk.*

Document "E." Copy of Order regarding Sale. Offered by Plaintiff

District Court of the United States of America for the District of Louisiana, holding sessions in the city of New Orleans. May term, A. D. 1877.

NEW ORLEANS, *the 31st day of May*, 1877.

Court met pursuant to adjournment.
Present: The Hon. E. C. Billings, judge.

69 E. C. HAMPSON *et al.*)
vs.) No. 1531.
CANAL STREET, CITY PARK AND LAKE R. R. COMPANY.)

On motion of Chas. S. Rice and Hornor & Benedict, attorneys for the assignees, and suggesting to the court the judgment herein en-

tered on 19th May, 1877, ordering the sale of the railroad and its appurtenances—

It is ordered by the court that said sale be made by J. R. G. Pitkin, U. S. Marshal, who is hereby appointed special master for that purpose, at the Canal street entrance of the custom-house building, after (30) days advertisement of the same in two daily papers published in the city of New Orleans, viz: The N. O. Picayune and the N. O. Bee, on the following terms, viz:

One-third cash, and the balance in one and two years credit, in notes of the purchaser drawn to his own order and by him endorsed, with interest at the rate of eight per cent. per annum from date of sale; said notes to be secured by mortgage on the property sold and the mortgage act to contain the clause *de non aliendo*, and to provide for attorney's fees for the collection of said notes at 5 per cent. if suit is necessary.

70 That the assignees be authorized to advertise said sale in one daily newspaper in New York, the New York Herald, and one daily newspaper in Chicago, the Chicago Inter-Ocean.

It is further ordered that the special master deposit immediately upon the sale the proceeds in the registry of the court.

A true extract from the minutes. CLERK'S OFFICE.
New Orleans, March 18th, 1880.
(Signed) R. DEVONSHIRE, *D'y Clerk.*

Document "F," Offered in Evidence by Counsel for Plaintiff. Order Confirming Sale.

District Court of the United States of America for the District of Louisiana, holding session in the City of New Orleans. November Term, A. D. 1877.

Court met persuant to adjournment.
Present: Hon. E. C. Billings, judge.

In re Canal Street, City Park and Lake R. R. Company. No 1531. In Bankruptcy.

71 This cause came on to be heard on the opposition to the sale herein made by the special master and was argued by counsel. On consideration whereof, and of the fact, although his honor had stated to the counsel at the hearing in open court that the said sale would be set aside upon any of the creditors' giving a better price for the property, yet no one has come forward and accepted the proposition.

It is therefore ordered that the said oppositions be dismissed, and that the sale and adjudication made on the 14th day of July, 1877, by J. R. G. Pitkin, special master, to Thomas H. Handy be ratified, confirmed, and homologated, and that said special master do make and execute the necessary deed to the purchase by act before J. A. Quintero, notary public of this city.

CLERK'S OFFICE.

A true extract from the minutes,
New Orleans, March 18, 1880.
(Signed) R. DEVONSHIRE, *D'y Clerk.*

72 *Document "M." Offered in Evidence by Counsel for Plaintiff. Special Master's Sale.*

United States District Court, District of Louisiana.

HAMPSEN *et als.* *vs.* CANAL STREET, CITY PARK AND LAKE RAILROAD CO.	In Bankruptcy. Railroad. No. 1531.

By virtue of an order of court, issued by the Honorable Edward C. Billings, United States judge district court for the district of Louisiana, sitting in bankruptcy, and to me directed as special master, in the above entitled and numbered suit, I shall proceed to offer at public sale, at the main entrance to the custom-house in the city of New Orleans, Louisiana, on Saturday, the 14th day of July, 1877, at the hour of 12 o'clock m., the Canal Street, City Park and Lake railroad, as follows:

1st. (Sq'r as in petition.)

2nd. The railroad or track, all and singular, built in pursuance of the charter of said company, and the various grants or
73 privileges conferred upon said company by the city of New Orleans, and constructed through the following streets or avenues of said city:

Commencing at the corner of Basin and Canal street, and thence down to Custom-House street, and Custom-House to Claiborne street, down Claiborne street to Bienville street, down Bienville street to St. Patrick, down St. Patrick street to Matierie road and Orleans avenue, down Orleans avenue and through City park to the Lake Pontchartrain; then along the lake shore to Spanish Fort; thence returning along the lake shore and through Orleans avenue to Bienville street, up Bienville street to Basin street, and thence in neutral ground in Basin street to Canal street, including the road-beds of main tracks and franchises and all rights and appurtenances of said railroad tracks, as well as rights of way thereto attached, together with the stations and buildings pertaining, car fixtures, stock, and other effects pertaining, and all the franchises and appurtenances of said Canal Street, City Park and Lake Railroad Company.

74 Terms of sale: One-third cash, and the balance in one and two years' credit in notes of the purchaser, drawn to his own order and by him endorsed, with interest at the rate of eight per cent. per annum from date of sale, and said notes to be secured by mortgage on the property sold, and the mortgage act to contain the clause, &c., *non alienando*, and to provide for attorney's fees for the collection of said notes at five per cent., if necessary.

New Orleans, La., June 14, 1877; June 4, 16, 23, 30, July 7, 14.

(Signed) J. R. G. PITKIN,
Special Master.

Document "N." Offered in Evidence by Counsel for Plaintiff. Process-Verbal.

HAMPSON & *als.*
vs.
CANAL STREET, CITY PARK AND LAKE RAILROAD CO. } In Bankruptcy. No. 1531.

By virtue of an order of court issued by the Honorable Edward C. Billings, United States district judge for the district of Louisiana, and to me as special master, directed in the above entitled
75 and numbered suit, I proceeded to advertise for sale in the New Orleans Picayune and the New Orleans Bee the said railroad and appurtenances, a copy of which advertisement is hereto attached and made part of the return, said advertisement appearing at intervals for the space of full thirty days before the day of sale, the first insertion appearing June 4th, 1877, and the last July 14th, 1877.

The said sale having been fixed for Saturday, the 14th day of July, 1877, at the hour of twelve o'clock "m.," at the main entrance to the custom-house on Canal street, in the city of New Orleans, Louisiana.

I repaired to the designated spot and caused said property to be cried in a loud and distinct voice at public outcry for sale, and after excepting from the combined sale the following, by order of court, viz:

3 dummie engines.
1 passenger car No. 11.
1 truck car.
1 iron tank.

And having given notice that the property known as the Spanish Fort was enjoined by order of the United States circuit court, and would not be sold, and after further loud and audible crying,
76 I adjudicated, subject to the order and approval of the honorable court, all of the right of way and franchises of said company, the track, bridges, iron, and all and singular the appurtenances, rolling-stock, real estate, depots, sheds, tanks, etc., etc., and all species and kinds of property not specially excepted as above, including the franchises from the Spanish Fort to the shell road, and the franchises from the Spanish Fort to Milneburg, to Thomas H. Handy for the sum of twenty-five thousand dollars.

I then offered as a separate sale the three dummy engines, and adjudicated them upon the same conditions to Thomas H. Handy for the sum of two thousand four hundred and fifty dollars. I then offered as a separate offering or sale passenger car No. 11, one truck car, and one iron tank, and adjudicated them to Thomas H. Handy for the sum of one thousand dollars. In all these sales Thomas H. Handy was the last and highest bidder.

(Signed) J. R. G. PITKIN,
New Orleans, July 14th, 1877. *Special Master.*

Clerk's office. A true copy. New Orleans, March 18, 1880.
(Signed) R. DEVONSHIRE, *Dy Clerk.*

77 *Document "O" Offered in Evidence by Counsel for Plaintiff.*

No. 2264. Administration Series.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *August 6th*, 1873.

An ordinance granting the right of a railroad from the neutral ground on Basin street, at the junction with Canal street, in the second district of the city of New Orleans, to Lake Pontchartrain, with privilege of extending the same along said lake shore.

Be it ordained, That the right of way be, and is hereby, granted to the Canal Street, City Park and Lake Railroad Company, to lay a single or double-track railroad: Provided, A double-track be laid from Basin to Broad street, with the necessary turn-outs, articles, — turn-tables through following streets: Commencing on the neutral —— on Basin street, second district, at its intersection with Canal street, thence along said neutral ground to Conti street, to Bernadotte street, thence along Bernadotte street to Orleans street, thence on the embankment along the western or upper side of Orleans canal to the lake shore, with the privilege of extending said railroad along
78 said lake shore to new canal, Bayou St. John, and Milneberg, with the privilege of constructing said railroad upon the lake shore levee when completed.

That the rights and privileges be, and are hereby, granted for the term of twenty-five years from the date of the passage of this ordinance upon the following conditions:

Article I.

The rails used in the construction of said road shall be of the T-rail pattern, and to weigh at least twenty pounds to the yard, and to be laid on cross-ties: Provided, however, That the rail will be laid in such a manner to allow a free passage of vehicles along and across the rail from Basin to Broad street, and on every street on the route whenever the street shall be graded, and curbs set by the city authorities.

Article II.

The lines and levels of the road to be located and marked by the city surveyor, approved by the council; the lumber and materials used in the construction of said road and bridges to be approved by and the road to be constructed under the supervision of the
79 administrator of improvements and the city surveyor, and that, should it even be deemed necessary to lower or change the grade of any part of said railroad, the same shall be done at the expense of the company: Provided, The company shall not be required to grade any more than may be required to lay their track or tracks.

Article III.

The company may use either the Remington car and engine,

Lammes' therms specific engine, or such other as may be approved by the council, or horse or mule power.

Article IV.

The rate of fare from Canal street to the city park, or for any intermediate distance, shall not exceed five cents for each and every passenger, and from the city park to the lake, new canal, Bayou St. John, or for any intermediate distance, the fare shall not exceed five cents for each passenger. The same rate for returning. The fare on the lake shore shall not exceed five cents for any distance, going or coming.

Article V.

The rate of speed not to exceed six miles per hour from
80 Basin street to Broad street: Provided, That the rate of speed on any part of the road, may hereafter at any time be limited by the city council to six miles per hour, and that the council may prescribe rules and points for landing and receiving passengers, and the said grantee shall run one car at least every half hour from each end of the road from 1 a. m. until 9 p. m., and from April to September, run a car every hour from 9 a. m. until 12 p. m.

Article VI.

The road, cars, and fixtures are to be assessed and made to pay an annual tax as other property of like value.

Article VII.

On the expiration of said right of way the road, rolling-stock, equipments, depots, and fixtures may be taken by the city at an appraised value, to be ascertained in the following manner: Two disinterested persons, one to be appointed by the city and the other by said grantee, shall fix said value, and in the event of disagreement an umpire shall be selected by said two appraisers, whose decision shall be final: Provided, That when the said two appraisers fail to agree upon an umpire, he shall be selected by a judge of one of the district court of the parish of Orleans.

81 Article VIII.

That the said grantee shall keep such portions of the street and public places as may be occupied by the tracks, side tracks, turn-outs, turn-table, and switches in good order and condition from curb to curb.

Article IX.

The work of construction of said railroad shall commence within thirty days after the passage of this ordinance, and be completed from Canal to Basin street to the lake shore, and in running order within twelve months from and after the passage of this ordinance. In case the road is not commenced, completed, and in active operation within the time specified, the rights and privileges herein granted shall be null and void.

And that part of road from the mouth of Orleans canal to the new canal, and from the mouth of Orleans canal to Milneburg, shall be completed and in actual operation within two years from the passage of this ordinance, under penalty of the forfeiture of the right of way for such portion of the road not completed along
82 the lake shore. The city, however, agrees to complete the excavation of Orleans canal on the west bank, and shall not put the said company in default until after the completion of said excavation.

Article X.

That nothing in the ordinance or in the grant of right of way, or other rights, or in the notarial act made in pursuance of this ordinance, shall be construed as binding the city of New Orleans, or making the said city liable, directly or in warranty, for any claims of citizens and corporations on account of said ordinance, grant, or notarial act, or any claim for infringement of rights or damages o persons or property caused by the grantee, or in any way resulting from the construction and operation of the said railroad by the said grantee, nor for any claims for damages, losses, or injuries sustained by the said grantee, or their successors or assigns, in case they should be deprived of their rights, or the interference with in the exercise thereof by any person whatsoever, save it be the lawfully constituted authorities of the city, nor shall the said city be liable for any work done or material used in paving or repairing streets in pur-
83 suance of this grant, or under the direction of any contract with said grantee.

Article XI.

That nothing in the grant or privileges granted shall be construed as authorizing said grantees the right or privilege of erecting any depots, sheds, or station-houses or buildings without plan and sites of the same be submitted to the council for their approval.

Article XII.

This ordinance, No. 1683, administration series, granting George F. Brott and his associates the right to construct a railroad, &c.

Also, ordinance No. 1843, administration series, amending the same, and all other ordinances bearing on this subject, are hereby repealed, and that the said grantees shall accept and agree to all the provisions of this ordinance, by filing with the mayor a certificate of acceptance within ten days after the passage of this ordinance; and failing therein, this ordinance to be null and void.

Article XIII.

Be it further ordained, etc., That this ordinance shall take effect frrm and after its passage.

84 Adopted by the council of the city of New Orleans, August 5th, 1873.

Yeas: Brewster, Calhoun, Fitzenrieter, Sturcken, Turnbull.

Signed) LOUIS A. WILTZ, *Mayor.*

(Signed) DANIEL SCULLY, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March 17th*, 1880.

A true copy of ordinance No. 2264, administration series, adopted by the council of the city of New Orleans, August 5th, 1873, and duly promulgated.

(Signed) ROBERT C. WOOD,
Secretary of Council.

Document "P." Offered in Evidence by Counsel for Plaintiff.

No. 2548, Administration Series.

CITY HALL, *March 25th*, 1874.

Be it ordained that ordinance No. 2264, administration series, granting the right of way for railroad to the Canal Street, City Park and Lake Railroad Company, be, and is hereby, so far amended as to read as follows:

That the right of way be, and is hereby, granted to the
85 Canal Street, City Park and Lake Railroad Company to lay single and double tracks, passenger and freight railroad, through the following-named streets, to wit:

Commencing on the neutral ground on Basin street, second district, at its intersection with Canal street, thence along said neutral ground to Conti street; thence in Conti street to Claiborne street; thence, in Claiborne street, to Bienville street; thence in Bienville street to Bernadotte street; thence in Bernadotte street to west bank of Orleans canal to May street, (near the lake shore;) thence in May street to Genois street; thence in Genois street to Bayou St. John, returning by another track through Genois and May streets to west bank of Orleans canal; thence, on west bank, to intersection of Bernadotte street and Materie road; thence along Matairie road to Anthony street; thence in Anthony street to Bienville street; thence in Bienville street to Basin street; thence in Basin street, neutral ground, to starting point at Canal street.

Adopted by the common council of the city of New Orleans March 24th, 1874.

(Signed) LOUIS A. WILTZ, *Mayor.*
(Signed) DANIEL SCULLY, *Secretary.*

86 MAYORALTY OF NEW ORLEANS,
CITY HALL, *March 17th*, 1880.

A true copy of ordinance No. 2548, administration series, adopted by the council of the city of New Orleans March 24th, 1874, and duly promulgated.

(Signed) ROBT C. WOOD,
Secretary of the Council.

Document "Q." Offered in Evidence by Counsel for Plaintiff.

No. 3146, Administration Series.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *June 16*, 1874.

Be it ordained, etc.:

That ordinance numbers 2264 and 2548, administration series,

granting the right of way to the Canal Street, City Park and Lake Railroad Company be, and are hereby, so far amended as to read as follows:

That the right of way be, and is hereby, granted to the Canal Street, City Park, and Lake Railroad Company to lay a single or double track passenger and freight railroad through the following-named streets, viz:

87 Commencing at the neutral ground on Basin street, second district, at its intersection with Canal street; thence along said neutral ground to Bienville street; thence in and along Bienville street to St. Patrick street; thence in and along St. Patrick street to the west bank of Orleans canal; thence along Orleans street, on the west side of the canal, to May street, near the lake shore; thence in May street to Genois street; thence in Genois street to the Bayou St. John, returning in the same street to the west bank of Orleans canal; thence along said bank, on the west side of Orleans street, to the intersection with Bernadotte street and Metairie road; thence along Bernadotte street to the intersection with Bienville street; thence along Bienville street to Claiborne street; thence in neutral ground to Custom-House street; thence in and along Custom-House street to the neutral ground on Basin street; thence to the starting point on Canal street.

Be it further ordained, etc.:

That permission be and is hereby granted to the Canal Street, City Park and Lake Railroad Company to use one or more dummy

88 engines, similar in pattern and style to those now used in the elevated railway in York city.

Adopted by the council of the city of New Orleans June 15, 1875.

(Signed) CHAS. J. LEEDS, *Mayor.*

T. H. HARDY, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March 17th*, 1880.

A true copy of ordinance No. 3146, administration series, adopted by the council of the city of New Orleans June 15th, 1875, and duly homologated.

(Signed) ROBT C. WOOD,
Secretary of the Council.

Act of Mortgage. "G." Filed 13th December, 1878.

Sale of Canal Street City Park and Lake Railroad Company to Thomas H. Handy.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Be it known that on this the twenty-sixth day of the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and

89 second, before me, Joseph A. Quintero, a notary public, duly commissioned and qualified, in and for the city of New Or-

leans, in the parish of Orleans and State of Louisiana, domiciliated in the said parish of Orleans, and in the presence of the witnesess hereinafter named and undersigned—

Personally came and appeared John R. G. Pitkin, of lawful age, and a resident of the said city of New Orleans, herein appearing and acting in his representative capacity as special master for the purpose of this sale as such, and appointed under an order of the Honorable Edward C. Billings, judge of the United States district court for the district of Louisiana, dated May the 31st, 1877, rendered in the matter of the suit entitled and styled Edward P. Hampton *et al. vs.* Canal Street, City Park and Lake Railroad Company, in bankruptcy, and numbered 1513 on the docket of the said Honorable court, as fully shown by the copy of said order hereto annexed and made part hereof: who declared—

That whereas, by virtue and pursuant to the aforesaid order of said Honorable E. C. Billings, judge of the said court, rendered
90 in the matter of the said above entitled and numbered cause, directed to him as special master aforesaid, and, after all due and legal advertisement in the New Orleans Picayune and New Orleans Bee, he did, on Saturday, the 14th day of July, one thousand eight hundred and seventy-seven (1877), at the hour of twelve o'clock "m.," at the main entrance to the custom-house, on Canal street, in the city of New Orleans, offer for sale, at public auction, and at said offering did adjudicate unto one Thomas H. Handy, of the city of New Orleans, as the last and highest bidder, upon the terms and conditions hereinafter expressed and set forth, certain property and effects hereinafter fully and particularly described:

Wherefore, the premises considered, and in order to vest in the said adjudicatee an authentic title to the said property and effects adjudicated to him as aforesaid, he does by these presents grant, bargain, sell, convey, transfer, assign, set over, and deliver, with all the legal warranties vested in him as special master aforesaid, and with full substitution and subrogation to all of the said rights
91 and actions of warranty, unto said Thomas H. Handy, adjudicatee at the said auction sale, here present purchasing and accepting the same for the benefit of himself, his heirs, and assigns forever, and hereby acknowledging possession and delivery thereof, all and singular the following-described property and effects, to wit:

1st. Right of Way.

1st. All the right of way and powers, privileges, and immunities and franchises conferred and granted by the city of New Orleans to the said Canal Street, City Park and Lake Railroad Company under an ordinance No. 2264, adopted on the 5th day of August, 1873, by the council of the said city of New Orleans; ordinance No. 2548, adopted March 24th, 1874, by said council, as will more fully appear by reference to the duly certified copies of the said ordinance hereto specially annexed for that purpose and made part hereof.

2d. The right of way, franchises, and privileges conferred by the said city of New Orleans through the following streets and avenues of said city, viz:

92 Commencing at the corner of Basin and Canal streets and thence down to Custom-House street, out Custom-House street to Claiborne street, down Claiborne street to Bienville street, down Bienville street to St. Patrick street to Metairie road and Orleans avenue, and through City Park to the Lake Pontchartrain; thence along the lake shore to Spanish Fort; thence, returning, along the lake shore and through New Orleans avenue to Bienville street, and up Bienville street to Basin street; thence up neutral ground, in Basin street, to Canal street, the place of beginning.

3d. The right of way and franchises from the Spanish Fort to the shell road on the upper or west side of the new canal, and from the said Spanish Fort to the town of Milneburg, with the right granted to said company to place their road-bed on the revetment levee when the same shall be built by the city of New Orleans.

The said franchises giving the right of way along the lake shore from Milneburg to the aforesaid shell road, or what is known as the new lake, and fully described in the ordinance above referred to and hereto annexed.

2d. Appurtenances.

93 4th. The road-bed or tracks proper as now laid and constructed through the avenues and streets hereinbefore described in section second, and comprising all the iron T rail, bars, and spikes, cross-ties, grading from Canal street to City park, the bridge at the lake, bridges along the road, plank crossings through the streets, ballast or road-bed, three (3) turn-tables, frogs, and switches, grading and embankments from City park to lake, grading and embankments from lake to Spanish Fort, and extra curve work and turn-outs.

5th. Two hand cars, one passenger car No. one, one open passenger car, one box passenger car, one Remmington passenger steam dummy car, and one box car.

3d. Miscellaneous Property.

6th. Two hundred and thirty-six (236) rails, more or less, averaging about thirty-two (32) tons, one pilot or cow-catcher, three (3) iron ash pans, eight (8) iron frogs, four (4) iron draw-heads, (4) four kegs of old iron, two bundles of shingles, fifteen bundles of fish plates or bars, four turn-tables rollers, one turn-table, centre plate, one keg of bolts, work bench and tools in tool-house, and etc.

94 4th. Real Estate.

7th. A certain square of ground situate in the Faubourg Jackson, in the second district of the city of New Orleans, in the square bounded by Custom-House, St. Patrick, Bienville, and Olympia streets, designated as square No. sixty-three (63) on a plan drawn by John Schreiber, civil engineer, dated March 22d, 1836, and according to said plan measuring three hundred feet on each of said Custom-House and Bienville street and two hundred and ninety-

seven feet (297) front on each of said St. Patrick and Olympia streets, together with the cypress fences and all the buildings and improvements thereon, and all the rights, ways, privileges, servitudes, and appurtenances thereunto belonging or in anywise appertaining, and being the same property acquired by said Canal Street, City Park and Lake Railroad Company by purchase from Anatole Forstall, by act passed before James Fahy, a notary public in this city, dated July 22d, 1878, and duly registered in the office of the register of conveyance in this city in book 103, folio 429.

5. Rolling Stock.

95 8th. The three dummies or engines known respectively as the "Thos. H. Handy," "Geo. F. Brott," and "W. H. Bell," offered and adjudicated separately at same sale.

9th. One passenger car No. eleven (11), one flat car or truck car, and one iron tank, likewise offered and adjudicated separately at the said auction sale.

And here the said John R. G. Pitkin, special master aforesaid, further specially declared that the real estate belonging to the said Canal Street, City Park and Lake Railroad Company, known as the Spanish Fort, situate in the second district of the city of New Orleans, at the mouth and on the left bank of the Bayou St. John, and on the margin of Lake Pontchartrain, is not included in the property and effects herein sold as belonging to the said company, by reason of the same having been enjoined from sale by the said honorable United States district court for the district of Louisiana in the order granted by said honorable court for the sale of said property and effects rendered in the matter of the said above and en-
96 titled cause, and which aforesaid exemption from *from* sale the said Thomas H. Handy, adjudicatee and purchaser herein, specially acknowledges.

And this sale with the above reservations, and in accordance with the term and conditions of said adjudication, is made and accepted for and in consideration of the price and sum of twenty-eight thousand four hundred and fifty dollars ($28,450), being at the rate of twenty-five thousand dollars ($25,000) for the property and effects hereinabove described in sections first, second, third, fourth, fifth, sixth, & seventh; two thousand four hundred and fifty dollars ($2,450.00) for the property and effects hereinabove described in section eight, separately adjudicated as aforesaid, and one thousand dollars ($1,000) for the property and effects hereinabove described in section ninth, likewise separately adjudicated as aforesaid, and all aggregating the said sum of twenty-eight thousand four hundred and fifty dollars ($28,450.00), the said purchase price herein.

And the said Thomas H. Handy, adjudicatee and purchaser herein, in compliance with the terms and conditions of his
97 said adjudication, have, in part payment and reduction of the said purchase price, paid in cash, in United States Treasury notes, into the hands of the register of the said United States dis-

trict court for the district of Louisiana, the full sum of nine thousand four hundred and eighty-three dollars and thirty-three and one-third cents ($9,483.33⅓), being one-third of said purchase price, the receipt whereof by John Devonshire, the duly qualified and appointed clerk and representative of said registry, who herein appears for that special purpose, is hereby acknowledged and full acquittance and discharge by him therefore granted unto said purchaser.

And in further liquidation and settlement of the said purchase price the said Thomas H. Handy, purchaser, has made, executed, and issued his two certain promissory notes for the like sum of nine thousand four hundred and eighty-three dollars and thirty-three and one-third cents ($9,483.33⅓) each, drawn by him to the order of and endorsed by himself, dated at the city of New Orleans on the thirtieth day of November, 1877, the date of the confirmation of
98 the said adjudication by judgment of the said honorable district court, payable respectively in one and two years after date, and bearing interest at the rate of eight per cent. per annum from date until paid, and which said two promissory notes, after having been duly paraphed *ne varietur* by me, notary, for identification herewith, were delivered to the said John Devonshire, clerk and representative aforesaid, who hereby acknowledges the receipt thereof, and grants full and complete discharge and acquittance to the said purchaser thereof.

And now, in order to secure the full and punctual payment of the said two above-described promissory notes at maturity, in capital and interest, together with all costs, charges, protest, and attorney's fees which may accrue thereon, which said attorney fees are to accrue only in case resort to judicial proceedings become necessary to enforce the collection of said notes, or any one part thereof, and so accruing are hereby fixed at the sum of five per cent. on the amount sued upon, the said Thomas H. Handy, purchaser herein, does hereby retain vendor's lien and privilege on all of the said property and effects being conveyed and sold, and to the same end and in
99 addition to the said vendor's lien and privilege, the said Thomas H. Handy, purchaser herein, does hereby moreover specially mortgage, affect, and hypothecate the said described property and effects herein conveyed unto the said John R. G. Pitkin, in this capacity as special master of the said Canal Street, City Park and Lake Railroad Company, in bankruptcy, for the benefit of all whom it may concern, the said vendor's lien and privileges and special mortgage herein granted, as aforesaid, to inure to the benefit of any and all future lawful holder or holders of said notes, the said Thomas H. Handy, purchaser and mortgagor herein, hereby binding himself, his administrators, executors, and heirs, not to sell, alienate, deteriorate, nor encumber the said property and effects herein mortgaged to the prejudice of these presents.

And the said Thomas H. Handy, purchaser and mortgagor herein, moreover declared that he does, by these present, consent, agree, and stipulate that in the event of the above described two promissory notes not being fully and punctually paid at maturity in capital,

interest, costs, charges, protest, and attorneys' fees, as aforesaid, it shall be lawful for, and he does hereby authorize, any and all lawful holder or holders of the said notes to cause all and singular the said described property and effects herein conveyed to be seized and sold under executory process issued from any court of competent jurisdiction to the highest bidder for cash, hereby confessing judgment on said notes for the full amount thereof including all costs, charges, and expenses, as aforesaid.

And by reference to the certificate of the register of conveyance for the parish of Orleans, dated December 17th, 1877, and hereto annexed, it does not appear—

1st. That the said Canal Street, City Park and Lake Railroad Company has alienated the said real estate herein described and conveyed; and,

2d. That said company has not alienated its rolling-stock, movable effects and appurtenances, right of way, privileges, franchises, etc., acquired by said company from and after the 19th May, 1873, except the transfer and assignment in bankruptcy made in September 18th, 1876, to James A. Shakespeare, assignee of the estate of said Canal Street, City Park and Lake Railroad Company, registered in Book 107, folio 733, and Book 108, folio 814, in said conveyance office, with which certificate said purchase is satisfied.

And by reference to the certificate of the recorder of mortgages for the parish of Orleans, hereto annexed, it does not appear that there are any mortgages standing in the name of said Canal Street, City Park and Lake Railroad Company, and recorded against said property and effects herein conveyed and sold.

And as per the annexed order of the United States district court, dated January 2d, 1878, the said J. R. G. Pitkin, special master aforesaid, sells, and the purchaser herein accepts, the property and effects herein conveyed, free and clear of all encumbrances existing thereon for taxes in favor of the State of Louisiana and city of New Orleans, including drainage taxes, reserving, however, the right of said State and city on the proceeds of the sale of said property and effects herein conveyed.

And as per the annexed certificate of judgment and order of said honorable court, dated January 25, 1878, the said purchaser herein had credited on the cash portion of the purchase price the sum of $3,233.15, amount charged and expenses allowed him, has, in accordance with said order and judgment aforesaid, deducted the said amount of $2,233.15 from the cash portion of the said purchase price herein, and paid the sum of $6,250.18¾, the balance of the cash portion of said purchase price, into the registry of said court, the receipt whereof by the said John Devonshire, acting as aforesaid, is hereby acknowledged, and full acquittance thereof granted.

Thus done and passed at the city of New Orleans in the presence of Joseph P. Horner and P. E. Burke, witnesses of lawful age, and

domiciliated in this city, who sign these presents, together with said party and me, notary, on the day and date first above written.

(Original signed): JOHN R. G. PITKIN,
Special Master.
THOMAS H. HANDY.
J. DEVONSHIRE.
JOSEPH P. HORNER.
P. E. BURKE.
JOSEPH A. QUINTERO,
Notary Public.

103 I hereby certify the above and foregoing to be a true and correct copy of the original act now on file and of record in my office.

New Orleans, December 10th, 1878.

(Signed) JOSEPH A. QUINTERO,
Not. Public.

Act of Mortgage "J." Offered in Evidence by Counsel for Plaintiff.

Sale of property, franchises, &c. M. and L. Schuartz to New Orleans, Spanish Fort and Lake Railroad Company.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Be it known, that on this 9th day of April, in the year of our Lord one thousand eight hundred and seveny-nine, before me John Bendernagal, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Moses Schuartz and Louis Schuartz,
104 composing the firm of M. Schuartz & Bro., of this city, who declared, that for the consideration, and on the terms and conditions hereinafter set forth, they do, by these presents, grant, bargain, sell, convey, transfer, assign, set over, and deliver, with all lawful warranties, and with full subrogation and substitution to all their rights and actions in warranty unto the New Orleans, Spanish Fort and Lake Railroad Company, of this city, herein represented by Moses Schwartz, president of said company, hereunto duly authorized by a resolution of the board of directors of said company, adopted at their meeting held on the 3rd day of April, 1879, as will appear by reference to a duly certified abstract from the minutes of said company hereunto in the margin annexed for reference, accepting and purchasing for said company, and in its behalf acknowledging due delivery and possession thereof, the following described property, franchises, effects, &c., to wit:

First. All and singular the right of way, powers, privileges,
105 and immunities, and franchises conferred and granted by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of ordinance number 2264, adopted on the fifth day of August, 1873, by the council of the city of New Orleans, and amended by ordinance No. 2548,

adopted March 24th, 1874, by the said council, as will more fully appear by reference to the said ordinances.

Second. The right of way, franchise, and privileges conferred by said city of New Orleans through the following streets or avenue of said city, viz:

At the corner of Basin and Canal streets; thence down to Custom-House street; out Custom-House street to Claiborne street; down Clairborne street to Bienville street; down Bienville street to St. Patrick street, to Metarie road and Orleans avenue, and through the city park to Lake Pontchartrain; thence along the lake shore to Spanish Fort; thence returning along the lake shore and through Orleans avenue to Bienville street, and up Bienville street to Basin street; thence up the neutral ground and Basin street to
106 Canal street, the place of beginning.

Third. The right of way and franchises from the Spanish Fort to the shell road, on the upper or west side of the new canal, and from the Spanish Fort to the town of Mulneburg, with the right granted to said company to place their road-bed on the revetment line when the same be built by the city of New Orleans, the same franchises giving the right of way along the lake shore from Mulneburg to the aforesaid shell road, or what is known as the new lake, and fully described in the said ordinance.

Fourth. The road-beds or tracks proper, as now laid and constructed through the avenues and streets hereinbefore described, and comprising all the iron "T" rails, bars, spikes, cross-ties, grading from Canal street to city park, the bridges at the lake, bridges along the road, plank crossings through the streets, ballast, and road-bed, their turn-tables, frogs, and switches, grading, and embankments from the lake to the Spanish Fort, and extra curve works and turnouts.

Fifth. Two hand-cars, one passenger car number one, one
107 Remmington passenger steam dummy car, and one box car.

Sixth. Two hundred and thirty-six rails, more or less, averaging about thirty-two tons; one pilot or cow-catcher; three iron ash-pans; eight iron frogs; four iron draw-heads; four kegs of old iron; two bundles of shingles; fifteen bundles of fish-plates or bars; four turn-table rollers and turn-table centre plate; one keg of bolts, work-bench and tools in tool-house, &c.

Seventh. A certain square of ground situate in the Faubourg Jackson, in the second district of this city, in the square bounded by Custom-House, St. Patrick, Bienville, and Olympia streets, designated as square number sixty-three, on a plan drawn by John Schreiber, civil engineer, dated March 22d, 1836, and according to said plan, measuring three hundred feet front on each of said Custom-House and Bienville streets, and two hundred and ninety-seven feet front on each of said St. Patrick and Olympia streets, together with the cypress fences and all the buildings and improve-
108 ments thereon, and all the rights, ways, privileges, servitudes and advantages thereunto appertaining and belonging.

Eight. Three dummies or engines, known respectively as the "T. H. Handy," "Geo. F. Brott," and "W. H. Bell."

Ninth. One passenger car No. eleven; one flat car or truck car, and one iron tank, together with all the movable property of said road.

Being the same property which was acquired by said vendor by purchase at a sale made by the sheriff of the parish of Orleans, on the eight day of March, 1879, by virtue of a writ of seizure and sale to him directed by the honorable the fifth district court for the parish of Orleans, at the suit of Mrs. Elizabeth Stradtman *et al. vs* Thomas H. Handy, being number 9486 of the docket of said court, as per sheriff's deed, dated 4th April, 1879, recorded in the clerk's office of said court, in Deed Book 22, folio 271 to 376 inclusive, and registered in the conveyance office in book 111, folio 764.

To have and to hold said property, franchise, effects, &c.,
109 unto said company, and its assigns, forever. This sale is made and accepted for and in consideration of the price and sum of fifty thousand dollars payable in full paid up capital stock of said New Orleans, Spanish Fort and Lake Railroad Company, in the proportion of two hundred and fifty shares of each of said vendors, being the share subscribed for by them.

All the taxes due and collectable on said property are hereby assumed by the said company, said parties hereto dispensing with the production of the tax receipts, and binding themselves and said company to hold the undersigned notary harmless and free from all liability which may result from the non-payment of any taxes due or the non-production of the said receipts.

By reference to the certificate of the register of conveyance for this city, dated this day, it will appear that said vendors have not heretofore alienated said property; said certificate is hereto annexed, and said parties hereto dispense with the production of a certificate from the recorder of mortgages for this parish, to be hereto annexed, showing what mortgagor stands recorded against said property in the name of said vendors.

110 Thus done and passed in my notarial office, at New Orleans aforesaid, in the presence of Paul Reusch and James Neuman, competent witnesses, residing in this city, who hereunto subscribe their names, together with said parties and me, notary, on the day and date set forth in the caption thereof.

(Original signed) MOSES SCHUARTZ.
LOUIS SCHUARTZ.
MOSES SCHUARTZ, *President.*
PAUL REUSCH.
JAMES NEUMAN.
J. BENDERNAGEL, *Notary Public.*

A true copy.
(Signed) J. BENDERNAGEL, *Not. Pub.*

Charter. Filed April 7th, 1880.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Be it known that on this thirty-first day of January, in the year one thousand eight hundred and seventy-eight, before me, John

Bendernagel, a notary public in and for the parish of Orleans, State aforesaid, and in the presence of witnesses hereinafter named and undersigned, personally came and appeared the persons whose
111 name- are hereunto subscribed, all of this city, who severally declare that, availing themselves of the provision of the general laws of this State relative to the organization of corporations for works of public improvements, and for other purposes, they have agreed, and by these presents do covenant and agree and bind themselves, and those whom they represent, to form themselves into and constitute a corporation under the following agreements and stipulations which they hereby adopt as their charter:

Article First.

The corporate name of said corporation shall be "The Canal Street, City Park and Lake Railroad." Its domicil shall be in this city, and it shall have a corporate seal with the name of the company engraved thereon.

Article Second.

The object and purposes for which this corporation is formed are hereby declared to be to construct and operate a railroad from Canal street to Lake Ponchartrain, thence along the lake shore, as provided in an ordinance of the city of New Orleans, No. 2264, administration series, and the amendments which have been made thereto, or may hereafter be made, granting the right to construct and operate said road.

112 Article Third.

The president of this company is hereby designated as the officer upon whom all citations and other legal processes shall be served, and in his absence the same shall be served upon the vice-president. This company shall have and enjoy succession for a period of twenty-five years from the date hereof.

Article Fourth.

The capital stock of this company is hereby fixed at one hundred and fifty thousand dollars, to be represented by fifteen thousand shares of ten dollars each, which may be increased by a vote of a majority of the stockholders, at a meeting called for that purpose, to a sum exceeding two hundred thousand dollars. The value of the property and franchises of the late Canal Street, City Park and Lake Railroad Company, now belonging to the parties to this act, and which are to be and become the property of the corporation formed by this act, is hereby fixed at the sum of seventy-one thousand eight hundred and eighty-one dollars and eighty-two cents, exclusive of the amount of two promissory notes drawn by Thomas H.
113 Handy to his own order, and by himself endorsed, dated 30th November, 1877, and made payable, each for the sum of nine thousand four hundred and eighty-three dollars and thirty-three and one-third cents respectively, in one and two years, with interest

at eight per cent. per annum from date until paid, and paraphed "*Ne varietur*" by J. A. Quintero, notary, for identification with act passed before him on the 26th day of January, 1878, by which said railroad and its franchises were purchased by said Handy; the payment of which notes is assumed by said company, for and in payment of which sum of seventy-one thousand eight hundred and eighty-one dollars and eighty-two cents the parties hereto shall have and receive, each, shares of the full paid-up stock of this company in proportion to the amount of their several contributions to the purchase-price of said railroad and its franchises.

All stock subscribed for shall be paid at the time and in the manner following, to wit:

Twenty-five per cent. at the time of subscribing, and the remainder in installments, not to exceed twenty-five per cent. of any subscription when called for by the board of directors after ten
114 days' notice thereof has been published in the city. In default of the payment of any installment as herein provided, the board of directors may declare the said stock, and the payment therein made, as forfeited to said company, and they may authorize the stock so forfeited to be again subscribed for, or otherwise dispose of the same as they may think best for the interest of the company.

Article Fifth.

This charter may be altered and amended by a vote of three-fourths of the stockholders convened for that purpose after thirty days' notice shall have been published in two of the daily newspapers in this city.

Article Sixth.

All the powers of this corporation, except as herein limited, shall be vested in a board of directors composed of seven stockholders, four of whom shall compose a quorum for the transaction of business; each director shall hold at least one hundred shares of the capital stock of the company, and no stockholder shall be eligible as a director unless he has held a hundred shares in his own name
at least sixty days prior to the election for director, as herein
115 provided, it being provided, however, that until the next election of directors under this charter the board of directors shall be composed of the subscribers to this act, who shall at their first meeting elect from among their number a president and vice-president who shall, together with the directors, hold their office until their suuccessors are elected and qualified in accordance herewith.

It shall be the duty of the president to preside at all meetings of the board. In case of his absence or inability to act the vice-president shall perform all the duties of the president, and shall be vested with the same powers.

Minutes of the proceedings of the board of directors shall be kept by the secretary and signed by the president.

Article Seventh.

On the first Monday of January, eighteen hundred and seventy-nine, and annually thereafter, fifteen days' previous notice thereof being given in two of the daily papers published in this city, an election for directors for the ensuing year shall be held by the stockholders at the office of the company, and a plurality of the votes cast, counting one vote for each share of stock voted on,
116 either by the owner thereof or by his proxy, shall be sufficient for the election of directors; and if from any cause said election shall not be held at the time for which notices were given, the meeting of stockholders may be adjourned for fifteen days thereafter, and if necessary they may continue to adjourn for fifteen days until an election is effected, notice thereof being published as hereinbefore provided for.

Article Eight.

The board of directors shall have power to fill any vacancies that may occur among the directors from death, resignation, absence, or otherwise; they shall elect a treasurer and secretary and all other officers, clerks, and agents of the company which they may deem necessary, and shall define their duties, fix their salaries, and remove them at pleasure.

The board may grant for the transaction of the business of the company to committees of their body, and to their officers and agents, such power as they may deem expedient, and they may also appoint agents within or without this State under such conditions as they may think proper, and they shall have power to make laws, rules, and regulations, and to alter and amend the same whenever they consider it necessary to do so.

117 Article Ninth.

No stockholder of this company shall ever be liable or responsible for the contractor- faults of this corporation, nor shall any mere informality in its organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the amount of his stock.

Article Tenth.

At the termination of this charter the affairs of the company shall be liquidated by three commissioners appointed by the stockholders from among their own number, at a meeting convened for the purpose, after thirty days' previous notice in two daily newspapers published in this city. The duties of said commissioners shall be to liquidate finally all the business of the company on such terms and in such manner as shall be determined at said meeting by a majority of the stockholders present or represented. Should the company be dissolved at any time prior to the termination of this charter, the affairs thereof shall be liquidated by the commissioners, who shall be elected by two-thirds of the stock in amount at a meeting of the stockholders convened as above provided, and the same amount of stock shall at that meeting determine the manner in which
118 said liquidation shall be made immediately.

Article Eleventh.

The names of the stockholders and the amount of stock subscribed by each are thereby declared to be as follows- written.

This done and passed in my notorial office, at New Orleans aforesaid, in the presence of Paul Reusch and John Medly, competent witnesses, residing in this city, who hereunto subscribe their names, together with said parties and me, notary, on the day and date set forth in the caption thereof.

J. BERDEMAGEL,
Not. Pub.

PAUL REUSCH.
JOHN MEDLY.

I, the undersigned, recorder of mortgages in and for the parish of Orleans, State of Louisiana, do hereby certify that the written and foregoing charter of the Canal Street, City Park and Lake Railroad Company was this day duly recorded in my office, in B. 152 to 204, 205, 206, 207, and 208.

New Orleans, Feb. 26th, 1878.

(Signed) J. G. RICHARDSON,
Deputy Recorder.

I certify the foregoing and within to be a true and correct
119 copy of the original act on file and of record in my notorial office.

In faith whereof I hereunto set my hand and seal, this 26th February, A. D. 1878.

J. BENNERNAGEL,
Not. Pub.

Document "T," Offered in Evidence by Counsel for Plaintiff. Filed April 3rd, 1880.

VINCENT MICAS, Successor to THOMAS H. HANDY.

NEW ORLEANS, *16th May*, 1879.

WM. H. BELL, Esq., *Civil Engineer, Present.*

DEAR SIR: I desire that you proceed without delay to make a survey of the property on the west side of Bayou St. John and fronting Lake Pontchartian. As I intend making improvements in the front of same and over the water, I desire the east and west boundary lines run and staked out to a proper depth of water to receive a hotel and yatch club house in front of the new bath house now being erected by Mr. L. F. Gery, and a large pic-nic pavillion between said bath house and the orchard.

120 The plan for above-named improvements you will please prepare immediately.

Respectfully, yours,
"Signed" VINCENT MICAS.

Charter. State of Louisiana, Parish of Orleans, City of New Orleans.

Be it known, that on this thirty-first day of March, in the year

Article "Sixth."

This charter may be altered or amended or this company dissolved by a vote of three-fourths of the stock present or represented at a meeting convened for that purpose, after thirty days' notice shall have been published in two of the daily newspapers of this city.

Article "Seventh."

No stockholder of this company shall ever be liable or responsible for the contracts or faults of the company in any further sum than the unpaid balance due to the company on shares owned by him, nor shall any mere informality in organizing have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the amount of his stock.

Article Eight-.

The names of the stockholders and the amount of stock subscribed by each are hereby declared to be as below written.

126 This done and passed in my notarial office, at New Orleans aforesaid, in the presence of Paul Reusch and James Newman, competent witnesses, residing in this city, who hereto subscribe their names, together with said parties and me, notary, on the [day] and date set forth in the caption thereof.

(Signed) PAUL REUSCH.
(Signed) JAMES NEWMAN.
(Signed) J. BENDERNAGEL,
Notary Public.

I certify the foregoing and within to be a true and correct copy of the original act of incorporation on file and of record in my notarial office.

In faith whereof, I hereunto set my hand and seal, this 31st of March, 1879.

J. BENDERNAGEL, *Notary Pub.*

I, the undersigned, recorder of mortgages in and for the parish of Orleans, State of Louisiana, do hereby certify that the within and foregoing act of incorporation was this day duly recorded in my office, in book 152, folio 307. J. G. RICHARDSON,
By R.

New Orleans, March 31st, 1879.

127 *Ordinance.*

(No. 4523. Administration Series.)

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 22, 1878.

An ordinance granting the right for a railroad from the neutral ground on Basin street, at the junction with Canal street, in the second district of the city of New Orleans, to Lake Pontchartrain, with privilege of extending the same along said lake shore.

Be it ordained, That the right of way be, and is hereby, granted to

the Canal Street, City Park and Lake Railroad Company to lay a single or double track passenger and freight railroad through the following-named streets, to wit:

Commencing at the neutral ground on Basin street, second district, at its intersection with Canal street, thence along said neutral ground to Bienville street, to St. Patrick street, thence in and along St. Patrick street to the west bank of Orleans canal, thence along Orleans street, on the west side of the canal, to May street, near the lake shore; thence in May street to Genois street, thence in Genois street to Bayou St. John, returning in the same street to the west bank of Orleans canal; thence along said bank, on the west side of Orleans street, to the intersection with Bernadotte street and
128 Metarie road, thence along Bernadotte street to its intersection with Bienville street to Claiborne street, thence in neutral ground to Custom-House street, thence in and along Custom-House street to the neutral ground on Basin street, thence to the starting point at Canal street.

That the rights and privileges be, and are hereby, granted for the term of twenty-five years from the date of the passage of this ordinance upon the following conditions:

Article I.

The rails used in the construction of said road shall be of the T rail pattern, and to weigh at least twenty pounds to the yard, and to be laid on cross-ties: Provided, however, That the rail will be laid in such a manner to allow a free passage of vehicles along and across the rail from Basin to Broad street, and on every street of the route, whenever the street shall be graded by the city authorities.

Article II.

The lines and levels of the road to be located and marked by the city surveyor, approved by the council. The lumber and materials used in the construction of said road and bridges to be approved by, and the road to be constructed under, the supervision of the administrator of improvements and the city surveyor; and that
129 should it ever be deemed necessary to lower or change the grade of any part of said railroad, the same shall be done at the expense of the company.

Article III.

The company may use either the Remington car and engine, Lamnis thermo specific engine, or such other as may be approved by the council, or horse or mule power.

Article IV.

The rate of fare from Canal street to the City park, or for any intermediate distance, shall not exceed five cents for each passenger, and from the City park to the lake, new canal, or Milneburg, or for any intermediate distance, the fare shall not exceed five cents for each passenger. The same rates for returning. The fare on the lake shore levee shall not exceed five cents for any distance, going or coming.

Article V.

The rate of speed not to exceed six miles per hour from Basin street to Broad street: Provided, That the rate of speed on any part of the road may hereafter at any time be limited by the city council to six miles per hour, and that the council may prescribe rules and points for landing and receiving passengers; and the said
130 grantee shall run one car at least every half hour from each end of the road from 6 a. m. until 9 p. m., and from April to September run a car every hour from 9 p. m. until 12 p. m.

Article VI.

The road, cars, and fixtures are to [be] assessed and made to pay an annual tax as other property of like value.

Article VII.

On the expiration of said right of way, the road, rolling-stock, equipments, and fixtures may be taken by the city at an appraised value, to be ascertained in the following manner: Two disinterested persons, one to be appointed by the city and the other by the said grantee, shall fix said value, and in the event of disagreement, an umpire shall be selected by said appraisers, whose decision shall be final: Provided, That when the said two appraisers fail to agree upon an umpire, he shall be selected by a judge of one of the district courts of the parish of Orleans.

Article VIII.

That the said grantee shall keep the streets and public places as may be occupied by the tracks, side tracks, turn-outs, turn-tables, and switches in good order and condition, from curb to curb.

131 Article IX.

The work of construction of said railroad shall commence within thirty days after the passage of this ordinance, and be completed from Canal and Basin streets to the lake shore, and in running order within sixty days from and after the passage of this ordinance. In case the road is not commenced, completed, and in actual operation within the time specified, the rights and privileges hereby granted shall be null and void. And that part of the road from the mouth of Orleans canal to the new canal, and from the mouth of Orleans canal to Milneburg, shall be completed and in actual operation within two years from the passage of this ordinance, under penalty of the forfeiture of the right of way for such portion on the road along the lake shore.

Article X.

That nothing in this ordinance, or in the grant of right of way or other rights, or in the notarial act made in pursuance of this ordinance, shall be construed as binding the city of New Orleans or making the said city liable directly or in warranty for any claims of citizens or corporations on account of said ordinance, grant, or nota-

rial act, or any claims for infringement of rights or damages
132 to persons or property caused by the grantee, or in any way resulting from the construction and operation of the said railroad by the said grantee; nor for any claims for damages, losses, or injuries sustained by the said grantees, in case they should be deprived of their rights or be interfered with in the exercise thereof by any person whatsoever, save it be by the lawfully constituted authorities of the city; nor shall the said city be liable for any word done or material used in paving or repairing streets in pursuance of this grant or under the direction of and *and* contract with said grantee.

Article XI.

That nothing in this grant or privileges granted shall be construed as authorizing said grantees the right or privilege of erecting any depots, sheds, or station-houses or buildings without plan and sites of the same be submitted to the council for their approval.

Article XII.

The city of New Orleans reserves the right to use the said railroads as a main trunk for other railroads which the city may from time to time order to be constructed by reimbursing to the contractor a fair and reasonable proportion of the value of the portions of the roads thus used, said proportion to be ascertained and fixed
133 by two disinterested parties, one to be appointed by the city and the other by the contractor; and in the event of a disagreement as to said proportion to be paid by the city between said persons thus appointed, a third person or umpire shall be appointed by one of the district courts of and in the city of New Orleans, the decision thereby had to be final.

Be it further ordained, That all ordinances or parts of ordinances now in existence that conflict with the foregoing be, and the same are hereby, repealed.

Adopted by the council of the city of New Orleans, May 21st, 1878.

Yeas—Brown, Cavanac, Denis, Diamond, Edwards, Rengstorff.

ED. PILSBURY, *Mayor.*

A true copy.

THOS. G. RAPIER, *Secretary.*

Act of Mortgage. Filed 3rd April, 1880. *Offered in Evidence by Counsel for Plaintiff.*

Sale of property, Vincent Micas to New Orleans, Spanish Fort and Lake Railroad Company.

134 STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Be it known that on this seventh day of June, in the year one thousand eight hundred and seventy-nine, before me, John Bendernagel, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses herein named and undersigned, personally came and

appeared, Vincent Micas, of this city, who declared that for the consideration and on the terms and conditions hereinafter set forth and expressed, he does by these presents grant, bargain, sell, convey, transfer, assign, and set over and deliver with all the lawful warranties, and with full subrogation to all his rights and actions in warranty unto the New Orleans and Spanish Fort and Lake Railroad Company of this city herein represented by Moses Schwartz, the president of said company, herein acting under and by virtue of a resolution of the board of directors thereof, adopted at their meeting held on the twenty-first day of May, 1879, a duly certified copy whereof is hereunto in the margin annexed for reference,
135 here present, accepting and purchasing for said company and its assigns, and in its behalf acknowledging due delivery and possession thereof, the following described property, to wit:

A certain portion of ground, together with the buildings and improvements thereon, and the rights, ways, privileges, servitudes, and advantage thereunto appertaining, and belonging, situate in the second district of this city, at the mouth of, and on the left bank of Bayou St. John, and on the margin of Lake Pontchartrain, which portion of ground measures, as per plan of Castaing and Celles, architects, annexed to an act passed before S. Magner, notary, on the 16 January, 1866, seven hundred and twenty-seven feet four inches, and two lines front on Bayou St. John, four hundred and nineteen feet front on Lake Ponchartrain, six hundred and thirty-one feet six inches, and a third line, and three hundred and forty-eight feet on a front line, together with all right and title of any other property and benefits of land adjoining towards the lake.

Being the same property which was acquired by said ven-
136 dor at a sale made by the sheriff of this parish, by virtue of a writ of seizure and sale to him directed by the honorable the fifth district court for the parish of Orleans, in the matter of Vincent Micas *vs.* The Canal Street, City Park and Lake Railroad Company, being No. 9773 of the docket of said court, as per sheriff's deed, dated May 12th, 1879; recorded in the clerk's office of said court in Deed Book Number 22, folios 453, 454, 455, 456, and 457, and registered in the conveyance office in book 109, folio 837.

To have and to hold said property and appurtenances unto said purchaser, its heirs and assigns, forever.

This sale is made and accepted for and in consideration of the price and sum of ten thousand dollars, of which the sum of four thousand dollars has been paid by said purchaser to said vendor, and for the balance of said price said Micas is entitled to three thousand dollars in shares of the capital stock of said company, full paid up, representing said amount, and for the remaining three thousand dollars said company, through its said president,
137 has made and issued a certain promissory note, subscribed by its said president, to the order of said company, and by him in its behalf endorsed, dated May 24th, 1879, and made payable for said sum of three thousand dollars in one year after date, and stipulating to bear interest at the rate of eight per cent. per annum from and after maturity until paid, which note, after having been par-

aphed "*Ne varietur*" by me, notary, for identification herewith, was delivered to said Micas, who hereby acknowledged receipt thereof, as well as of the said ready money.

And in order to secure the full and punctual payment of said note at maturity, together with all eventual interest, and all costs, charges, lawyers' fees, and expenses, as hereinafter set forth, said vendor does hereby retain vendor's lien privilege and special mortgage against said property herein conveyed to inure to the use and benefit of the future holders of said note. Now, if said note is not punctually paid in principal and interest at maturity, said vendor, or any future holder of said note, is hereby fully authorized to cause said property and appurtenances herein conveyed to be seized and sold under executory process to be issued by any court of competent
138 jurisdiction, said purchaser hereby confessing judgment for the full amount of said notes, together with all eventual interest, costs, charges, lawyers' fees (which latter are hereby fixed at five per cent. on the amount sued for, and all other necessary legal expenses whatsoever).

And said Schwartz binds his said company and its assigns to keep the buildings and improvements on said property constantly insured against loss or damage by fire up to the amount of said note, and to transfer the policy of insurance to said vendor for the benefit of the holders of said note, and in the event that said purchaser shall fail or refuse to cause said insurance to be effected, and to transfer the policy of insurance as aforesaid, said vendor or any future holder of said note is hereby fully authorized to cause said insurance to be effected at the expense of said company, the mortgage herein granted being extended to cover the amount of premiums paid.

And said Schwartz further binds his said company and its assigns not to sell, alienate, deteriorate, or incumber said property and
139 appurtenances to the prejudice of the mortgage herein retained, and which is hereby accepted.

All the taxes due and payable on said property have been paid, as per tax collector's receipts to me, notary, exhibited. The payment of the taxes due and eligible in the year 1880 is hereby assumed by said purchaser.

By reference to the certificate of the register of conveyance and recorder of mortgages for the city and parish, dated this day, and hereunto in the margin annexed for reference, it will appear that said vendor has not heretofore delineated said property, and that the same is free from all incumbrances in the name of said vendor.

Thus done and passed in my notarial office, at New Orleans aforesaid, in the presence of Paul Reusch and James Newman, competent witnesses, residing in this city, who hereunto subscribe their names, together with said parties and me, notary, on the day and date set forth in the caption.

(Original signed)

VINCENT MICAS.
M. SCHUARTZ, *President.*
PAUL REUSCH.
JAMES NEWMAN.
J. BENDERNAGEL,
Not. Pub.

140 I certify the foregoing and within to be a true and correct copy of the original act on file and of record in my office.

In faith whereof, I hereunto set my hand and seal this 17th March, 1880.

(Signed) J. BENDERNAGEL,
Notary Public.

Document "A." Offered in Evidence by Counsel for Defendants. Filed 3d April, 1880.

JULY 28TH, 1876.

Sale by the sheriff of the parish of Orleans to Vincent Micas of real estate.

Whereas I, Eugene Waggaman, sheriff of the parish of Orleans, by virtue of a writ of seizure and sale to me directed by the honorable the fifth district court for the parish of Orleans, at the suit of Vincent Micas *vs.* Canal Street, City Park and Lake Railroad Company, No. 7405 of the docket of said court, after having fulfilled and complied with all the previous legal requisites, did seize the following described property, to wit:

141 A certain portion of ground situated in the second district of this city, at the mouth of and on the left bank of Bayou St. John, and on the margin of Lake Pontchartrain, said portion of ground measuring, as per plan by Castaing and Cellés, architects, annexed to an act before S. Magner, late a notary public in this city, dated January 16th, 1866, seven hundred and twenty-seven feet four inches, two lines front on Bayou St. John, four hundred and nineteen feet front on Lake Pontchartrain, six hundred and thirty-one feet six inches on a third line, and three hundred and forty-eight feet on a fourth line, together with all the buildings and improvements thereon, rights, ways, customs, servitudes, and privileges thereunto belonging, or in any wise appertaining, and known as the "Spanish Fort," being the same property which the defendant herein acquired by purchase from Mrs. Lizzie Mills, wife of P. L. Remy, per act passed before P. C. Cuvellier, late a notary public in this city, on the thirteenth of March, 1874.

142 After having given due and legal notice to the said defendant of the said seizure in the manner pointed out by law, did advertise the said before-described property for sale after the expiration of the legal delay from the time of said notice, to wit:

On the twenty-third day of May, 1876, by advertisements composed in English, announcing the sale to take place at the Merchants and Auctioneers' Exchange, on Royal street, between Canal and Custom-House streets, in the second district of this city, on the twenty-fourth day of June, 1876, at 12 o'clock m. Said advertisements were inserted and published in English in one paper in the city of New Orleans, to wit, in the New Orleans Republican, from the said twenty-third day of May, 1876, to the day of sale, being full thirty days from the date of the first notice given in said newspaper. Said advertisements were inserted and published in said newspaper on the 23rd May and 3rd, 10th, and 24th June, 1876, in English, in the New Orleans Republican.

And having further complied with and performed all the additional previous legal requisites, said property having been duly appraised, did expose the same at the said Merchants and Auctioneers' Exchange on the said twenty-fourth day of June,
143 eighteen hundred and seventy-six, at 12 o'clock m. And at the same time and place of sale I did announce in a loud and audible voice the terms and conditions of sale hereinafter expressed and specified, and did read verbatim and in a loud and audible voice the certificate of the recorder of mortgages for the parish of Orleans, and city of New Orleans, delivered on the day of sale, and by which certificate it appears that there are no other mortgages standing in the name of said defendant and recorded against said before-described property than the following, to wit:

[Endorsed across the face in red ink:] Drawing paid in full & cancelled July 28, '76, by certificate of W. T. Mayo, for adm't's pub. acts, dated July 19, '76. F. M. Miller, d'y sheriff.

The Drawing Privilege.

B'k 129, fo. 146. Recorded 13th March, 1874. The mortgage in favor of Wid. P. L. Remy, act of Chs. Cuvellier, notary, dated 13th March, 1874, to secure $5,000, int., costs, &c.

[Endorsed across the face in red ink:] Cancelled July 28, '76, by certificate of sheriff. F. M. Miller, d'y sheriff.

B'k 137, fo. 778. Recorded 5th October, 1875. The privilege in favor of Schubert and Schutes for $653.13 for materials furnished and labor done on said property, as per affidavit dated 5th October, 1875.

B'k 138, fo. 69. Recorded 31st August, 1875. The mortgage
144 in favor of Wm. Henry, act of A. Hero, Jr., notary, dated 30th August, 1875, to secure the sum of $35,000, int., costs, &c.

[Endorsed across the face in red ink:] This three cancelled June 4th, 1878. J. G. Richardson, d'y r.

B'k 146, fo. 173. Recorded 7th Dec., 1875. The lease of said property unto H. T. Schelling. Act of A. Hero, Jr., notary, dated 6th Dec., 1875.

Book 149, fo. 54. 8th Dec., 1875. One mortgage, State taxes, 1874, $72.50.

B'k 50, fo. 72. 1st March, 1876. One mortgage, city taxes, 1875, $187.50.

[Endorsed across the face in red ink:] Cancelled July 28, '76, by certificate of sheriff. F. M. Miller, d'y sheriff.

[Endorsed across the face in red ink:] These three cancelled June 4th, 1878. J. G. Richardson, d'y clerk.

No. 8169. Book 144, folio 510. Recorded on the 29th March, 1876. The general one in favor of F. Rosenfeld, resulting from a judgment by the sixth district court on the 7th March, 1876, for the

sum of $440 & 27 cents, with interest stipulated in said judgment, & costs of suit against said company.

[Endorsed across the face in red ink:] Cancelled June 4th, 1878. J. G. Richardson, d'y r.

No. 82592. B'k 144, fo. 491. Recorded on the 17th March, 1876. The general one in favor of this city, resulting from a writ by the sup. district court on the 16th March, 1876, for the sum of $187 and 50 cents, with interest stipulated in said writ, and costs of suit against said property.

[Endorsed across the face in red ink:] Cancelled July 28th, 1876, by certificate of sheriff. F. M. Miller, d'y sheriff.

145 No. 7405. B'k 144, fo. 620. Recorded on the 15th May, 1876. The general one in favor of V. Micas, resulting from a writ by the fifth district court, on the 15th May, 1876, for the sum of $2,500 and — cents, with interest stipulated in said writ, and costs of suit against same.

[Endorsed across the face in red ink:] Cancelled July 28th, 1876, by certificate of the sheriff. F. M. Miller, d'y sheriff.

No. 6904. B'k 145, fo. 350. Recorded on the 17th Feb., 1876. The general one in favor of W. H. Reynolds, resulting from a judgment by the 5th dist. court, on the 1st February, 1876, for the sum of $500 and — cents, with interest stipulated in said judgment, and costs of suit against said company.

No. 6994. B'k 145, fo. 512. Recorded on the 11th May, 1876. The general one in favor of the same, resulting from a writ by the fifth dist. court, on the 11th May, 1876, for the sum of $500 and — cents, with interest stipulated in said writ, and costs of suit against said property.

[Endorsed across the face in red ink:] Both cancelled June 4th, 1878. J. G. Richardson, d'y r.

And at the same time and place of sale I did read *verbatim*, and in loud and audible voice, the certificate of the register of conveyances in and for the parish of Orleans, State of Louisiana, de-
146 livered on the day of sale, and by which certificate it does not appear that said defendants have alienated said before-described property, registered in book 105, folio 256.

When W. S. Benedict being the highest and last bidder, for account of Vincent Micas, the said property was adjudicated to the said W. S. Benedict for account of said Vincent Micas for the price and sum of five thousand dollars, payable cash, and which was settled for in the following manner, to wit:

1st. The purchaser has paid in cash the costs and charges of the above-entitled suit, including the attorney's fees, and costs of copy of act, the State taxes for the year 1874 and 1875, and the city taxes for the years 1874, 1875, and 1876, on said property, amounting in all to the sum of eight hundred and one dollars and forty-eight cents..... 801 48

2d. Said purchaser being the plaintiff in said above-entitled suit, and holder of the balance due on the mortgage, the first in rank under which this sale was made, has retained in his hands the
147 amount of his claim and said mortgage, with interest up to the day of sale; say, the sum of two thousand five hundred and fifty-five dollars and fifty-five cents ..... 2,555 55.

3d. Said purchaser has retained in his hands, to be by him applied to the proportions of State and city taxes for the current year on said property, the sum of seventy-three dollars and seventy-five cents 73 75

4th. And said purchaser has also retained in his hands the balance of the price of adjudication, to be by him applied to the payment of the subsequent mortgage certificate, and which balance amounts to the sum of fifteen hundred and sixty-nine dollars and twenty-two cents 1,569 22

Amount of sale $5,000 00

Now, therefore, know all men by these presents, that I, the said sheriff, in consideration of the premises and by virtue of the laws of the State of Louisiana in such cases made and provided, do
148 sell and transfer the said before described property to the said Vincent Micas, and all the rights and title which the said before described property, to have and to hold the same to the said Vincent Micas, his heirs and assigns forever.

In witness whereof I have hereunto signed my name at New Orleans, in the State of Louisiana, this twenty-eight day of July, in the year one thousand eight hundred and seventy-six, and the one hundred and first year of the Independence of the United States of America.

(Signed) For EUG. WAGGAMAN, *Civil Sheriff.*
EDW. S. WURZBURGER,
Dy Sh'ff of the Parish of Orleans.

Signed in the presence of the following competent witness-:
(Signed) M'CH'L DE ARMAS.
" F. M. MEILLER.

Registered in Conveyance B'k 106, fo. 603, New Orleans, July 28th, 1876.
(Signed) C. B. FISH, *Reg.*

Recorded in Mortgage Office Book No. 149, fo. 521, New Orleans, July 28th, 1876.
(Signed) C. DARCANTEL, *Dy Rec.*

149 Recorded in the clerk's office of the fifth district court for

the parish of Orleans in Deed Book No. 20, folios 335, 336, 337, 338, and 339,

New Orleans, 2d August, 1876.

(Signed) PAUL T. ABADIE, *D'y Clerk.*

Petition and Order for Seizure and Sale. Filed December 13th, 1878.

Mrs. Elizabeth Stratman *et al.*
vs.
Thomas H. Handy. } No. 9486.

To the honorable the judges of the fifth district court for the parish of Orleans:

The petition of Mistress Elizabeth Stratman, widow, residing in New Orleans, and of the New Albany Rail Mill Company, a corporation created by the laws of Indiana, where it has its domicil, respectfully shows:

That Thomas H. Handy, who also resides in New Orleans, is justly and truly indebted to this petitionor in the full sum of nine thousand four hundred and eighty-three $\frac{33}{100}$ dollars, with eight per cent. interest from 30th November, 1878, for this, to wit:

150 That petitioners are holders and owners for value of one certain promissory note, dated New Orleans, 30th November, 1877, drawn by Thomas H. Handy to his own order, and by him endorsed, for nine thousand four hundred and eighty-three $\frac{33}{100}$ dollars, with eight per cent. interest per annum from date, payable one year after date, which note is now wholly unpaid, all of which more fully appears by reference to said note and to the protest thereof, hereto annexed and made part hereof.

That said note, with another for like amount and same date, drawn by same maker to his own order, and by him endorsed in blank, payable two years after date, were given by said debtor for a portion of the price of the property hereinafter described, purchased by said debtor on the 26th Jan'y, 1878, and the payment of both said notes is secured by the vendor's lien and privilege upon said property, as well as by special mortgage upon said property, granted by said debtor on the 26th Jan'y, 1878, in favor of J. R. G. Pitkin, or any future holder and owner of said notes into whose hands they might come, all of which more fully appear by reference to

151 the authentic act of mortage and of purchase passed before J. A. Quintero, notary public, of date the 26th Januarv, 1877, herewith filed as part hereof.

That said property subject to said mortgage and vendor's privilege is as follows, that is to say:

All the right of way and powers, privileges, and immunities and franchises conferred and granted by the city of New Orleans to the said Canal Street, City Park and Lake Railroad Company, under the ordinance No. 2264, adopted on the 5th August, 1873, by the council of said city, and amended by ordinance No. 2548, adopted 24th March, 1874, by said council, as will more fully appear by reference to the duly certified copies of said ordinances specially referred to.

2d. The right of way, franchises, and privileges conferred by the

said city of New Orleans through the following streets or avenues of said city, to wit: Commencing at the corner of Basin and Canal streets and thence down to Custom-House street, out Custom-House street to Claiborne street, down Claiborne street to Bienville
152 street, down Bienville street to St. Patrick street, to Metairre road and Orleans avenue, and through City Park to the Lake Pontchartrain; thence along the lake shore to Spanish Ft.; thence returning along the lake shore and through New Orleans avenue to Bienville street, and up Bienville street to Basin street; thence up neutral ground in Basin street to Canal street, the place of beginning.

3d. The right of way and franchises from the Spanish Fort to the shell road, on the upper or west side of the new canal, and from the Spanish Fort to the town of Milneburg, with the right granted to said company to place their road-bed on the revetment level, when the same shall be built, by the city of New Orleans, the said franchises giving the right of way along the lake shore from Milneburg to the aforesaid shell road, or what is known as the New Lake, and fully described in the said ordinances above referred to.

2d. Appurtenances.

4th. The road-bed or tracks proper, as now laid and constructed through the avenues and streets hereinbefore described in sec-
153 tion second, and comprising all the iron T-rail, bar and spikes, cross-ties, grading, from Canal street to the City Park, the bridge at the lake, bridges along the lake, plank crossings through the streets, ballast or road-bed, three (3) turn-tables, frogs, and switches, grading and embankments from City Park to lake grading and embankments from lake to Spanish Fort, and extra curve work and turn-outs.

5th. Two hand cars, one passenger car No. one, one open passenger car, one box passenger car, one Remington passenger steam dummy car, and one box car.

3. Miscellaneous Property.

6th. Two hundred and thirty-six (236) rails, more or less, averaging about thirty-two (32) tons, one pilot or cow-catcher, (3) iron ash pans, eight (8) iron frogs, four (4) iron draw-heads, four (4) kegs of old iron, two (2) bundles of shingles, fifteen bundles of fish-plates or bars, four turn-table rollers, one (1) turn-table centre plate, one keg of bolts, work bench and tools in tool-house, and etc.

4. Real Estate.

154 7th. A certain square of ground situated in the Faubourg Jackson, in the second district of the city of New Orleans, in the square bounded by Custom-house, St. Patrick, Bienville, and Olympia streets, designated as Square No. sixty-three (63) on a plan drawn by John Schreiber, civil engineer, dated March 22d, 1836, and according to said plan measuring three hundred (300) feet front on each of said Custom-house and Bienvielle streets and two hun-

dred and ninety-seven (297) feet front on each of said St. Patrick and Olympia streets, together with the cypress fencess and all the buildings and improvements thereon, and all the rights, ways, privileges, servitudes, and appurtenances thereunto belonging, or in any way appertaining, and being the same property acquired by said Canal Street, City Park and Lake Railroad Company by purchase from Anatule Forstall by act passed, before James Fahey, a notary public in this city, dated July 22d, 1878, and duly registered in the office of the register of conveyances in this city in book 103, folio 429.

5. Rolling Stock.

8th. The three dummies or engines known respectively as
155 the "T. H. Handy," "Geo. T. Brott," and "W. H. Bell," and
9 one passenger car- No. Eleven (11), one flat car or truck car, and one iron tank, as is shown by said act of mortgage specially referred to for fuller explanation and greater certainity.

That in said act the mortgagor binds himself to pay five per cent. attorneys' fees upon the amount herein sued for, to be paid out of the proceeds of said mortgaged property; that said act imports a confession of judgment for the amount of said notes in favor of any holder thereof; and further, the said mortgagor in said act bound himself not to alienate or encumber said property to the prejudice of the mortgage created by said act.

Wherefore, petitioner prays that due notice be given to said debtor Thomas H. Handy according to law; that an order of seizure and sale be granted directing the seizure and sale of the aforesaid property, subject to the said vendor's lien and privilege and special mortgage; that the same be seized and sold accordingly for the payment of the aforesaid debt due to petitioner, to wit, the sum of nine
156 thousand four hundred and eighty-three $\frac{33}{100}$ dollars, with eight per cent. interest per annum thereon from 30th November, 1877, and upon the following terms and conditions, for cash, to an amount sufficient to pay the amount aforesaid now due upon the said matured note, interest and all costs, including five per cent. attorney's fees upon the principal and interest of said matured note, the purchaser further to assume as a part of the price of adjudication the payment of the said unmatured promissory note secured by vendor's lien and privilege and special mortgage on said property, the said property to remain in the hands of said purchaser affected by said lien and mortgage to secure the payment of said unmatured note to the extent of the portion of the price of adjudication accruing to and to be applied to said unmatured note, and said 5 per cent. attorney's fees thereon and the balance of the price of adjudication to be paid in cash; that accordingly petitioners be paid the amount of said matured note, interest thereon and costs, including said 5 per cent. attorney's fees on said matured note and interest, out of the cash proceeds of said property, the purchaser to assume
157 the payment as part of the price of adjudication the amount of said other unmatured note, with interest thereon, and to

pay also in cash the residue of said price of adjudication and for general relief.

(Signed) JOHN McENERY,
HENRY C. MILLER,
Att'ys for Pet'rs.

Order.

Let a writ of seizure and sale issue as herein prayed for and according to law.

New Orleans, 13th December, 1878.

(Signed) W. H. ROGERS, *Judge.*

Writ of Seizure and Sale.

State of Louisiana, Fifth District Court for the Parish of Orleans, The State of Louisiana.

Mrs. ELIZABETH STEDTMAN & *al.* *vs.* THOMAS H. HANDY. } No. 9486.

To the civil sheriff of the parish of Orleans, Greeting:

158 You are hereby commanded, in the name of the State of Louisiana, and of the fifth district court for the parish of Orleans, to seize and sell on the terms and conditions hereinafter specified the following-described property, to wit:

1st. Right of Way.

1st. All the right of way and powers, privileges, and immunities and franchises conferred and granted by the city of New Orleans to the said Canal Street, City Park and Lake Railroad Company, under an ordinance No. 2264, adopted on the 5th of August, 1873, by the council of the said city of New Orleans, and amended by ordinance No. 2548, adopted March 24th, 1874, by said council, as will more fully appear by reference to the duly certified copies of the said ordinance, hereto specially annexed for that purpose and made part hereof.

2d. The right of way, franchises, and privileges conferred by the said city of New Orleans, through the following streets and avenues of said city, viz:

Commencing at the corners of Basin and Canal streets, and thence down to Custom-House street, out Custom-House street to
159 Claiborne street, down Claiborne to Bienville street, down Bienville street to St. Patrick street to Matairie road and Orleans avenue, and through City Park to the Lake Ponchartrain, thence along the lake shore to Spanish Fort, thence returning along the lake shore and through New Orleans avenue to Bienville street, and up Bienville street to Basin street, thence up neuground, in Basin street, to Canal street, the place of the beginning.

3d. The right of way and franchises from the Spanish Fort to the Shell road on the upper or west side of the new canal and from the Spanish Fort to the town of Milneburg, with the right granted to

said company to place their road-bed on the revetment levee when the same shall be built by the city of New Orleans, the said franchises giving the right of way along the lake shore from Milneburg to the aforesaid Shell road or what is known as the New Lake, and fully described in the said ordinance above referred to, and hereto annexed.

2d. Appurtenances.

160 4th. The road-beds or tracks proper, as now laid and constructed through the avenues and streets hereinbefore described in section second, and comprising all the iron "T" rail bars and spikes, cross-ties, grading from Canal street to City park, the bridge at the lake, bridges along the road, plank road, crossings through the streets, ballast or road-beds, three turn-tables, frogs and switches, grading and embankments from City park to lake, to Spanish Fort, and extra curve works and turn-outs.

5th. Two hand-cars, one passenger car, No. one, one open passenger car, one Remington passenger steam dummy car, and one box car.

3. Miscellaneous Property.

6th. Two hundred and thirty-six rails, more or less, aver[ag]ing about thirty-two tons, one pilot or cow-catcher, three iron ash pans, eight iron frogs, four iron draw-heads, four kegs of old iron, two bundles of shingles, fifteen bundles of fish-plates, or bars, four turn-tables, rollers, one turn-table centre-plate, one keg of bolts, work-bench, and tools in tool-house, etc.

7th. A certain square of ground situate in the Fauburg
161 Jackson, in the second district of this city of New Orleans, in the square bounded by Custom-House, St. Patrick, Bienville, and Olympia streets, designated as square No. 63 on a plan drawn by John Schreiber, civil engineer, dated March 22d, 1836, and, according to said plan, measuring three hundred feet front on each of said Custom-House and Bienville streets, and 297 feet front on each of said St. Patrick and Olympia streets, together with the cypress fences and all the buildings and improvements thereon, and all the rights, ways, privileges, servitudes, and appurtenances thereunto belonging or in anywise appertaining, and being the same property acquired by said Canal Street, City Park and Lake Railroad Company by purchase from Anatole Forstall by act passed before James Fahey, a notary public in this city, dated July 22d, 1878, and duly registered in the office of the register of conveyance, in this city, in book 103, folio 429.

5. Rolling-stock.

8th. The three dummies or engines known respectively as
162 "Thomas H. Handy," "Geo. F. Brott," and "W. H. Bell," offered and adjudicated separately at same sale, and

9th. One passenger car number eleven, one flat car or truck car, and one iron tank likewise offered, and together with all the movable property of said road adjudicated separately at the said auction

sale; all of which will moae fully appear by reference to said act hereto annexed and made part hereof.

Terms and Conditions.

To pay and satisfy petitioners' claim, amounting to the sum of nine thousand four hundred and eighty-three $\frac{33}{100}$ dollars, with eight per cent. interest per annum thereon from 30 May, 1877, and upon the following terms and conditions for each, to an amount sufficient to pay the amount aforesaid now due upon the said matured note, interest, and all costs, including 5 per cent. attorney's fees upon the principal and interest of said matured note, the purchaser further to assume as a part of the price of adjudication the payment of the said unmatured promissory note, secured by vendor's lien and special mortgage on said property, the said property to re-
163 main in the hands of said purchaser affected by said lien and mortgage to secure the payment of said unmatured note to the extent of the property of the price of adjudication accruing to, and to be applied to the said unmatured note, and said 5 per cent. attorney's fees thereon and the balance of the price of adjudication to be paid in cash; that accordingly petitioner be paid the amount of said matured note, interest thereon and costs, including said 5 per cent. attorney's fees on said matured note and interest, out of the cash proceeds of said property, the purchaser to assume the payment as part of the price of adjudication the amount of said other unmatured note, with interest thereon, and to pay also in cash the residue of said price of adjudication.

And what you do in the premises you make return thereof, together with this writ, to our said court, as the law directs.

Witness the Honorable Walter H. Rogers, judge of our said court, this 17th day of December, in the year of our Lord one thousand eight hundred and seventy-eight, and the 103 year of the Independence of the United States.

(Signed) PAUL T. ABADIE, *Dep. Clerk.*

164 *Charges.*

Printing	56 80
Clerk's fees	23 55
Sheriffs	10 00
Mortgage certificate	2 00
Conveyance	2 00
Exchange duty	1 00
Appraisers' fees	100 00
Umpires	50 00
Keeping from Dec. 17,'78, to Jan'y 28, '79, 6 ks., 43 days	412 80
Printing	42 00
Mortgage certificate renewed	1 00
Conveyance	2 00
Mortgage cert.; name C. S., C. P. & L. R. R. Co.	5 00
Printing Democrat	48 00
" Times	6 00

Printing Picayune		6 00
" Bee		20 25
Clerk's fees		20 25
Sheriff's fees		16 00
Mortgage cert. renewed		1 00
Do. D. C. C., P. & L. R. R. Co.		1 00
Conveyance cert. renewed		2 00
Erasing mortgages		30 00
Certificate can'l mort.		3 00
Exchange duty		16 25
12 months' bond		1 00
Commission on sale & collections		62 75
Keeping additional as reduced		657 96
165 Printing, Price Current		4 50
Disbursement for repairing and running road pending the seizure		1,342 67
		2,932 53

Credits.

By cash received from daily receipts while running road,	354 95
	2,577 58
5 per cent. attorney's fees	522 42
	$3,700 00

Correct. E. & O. E. Oct. 13th, 1879.
(Signed) J. E. BAXTER, *D'y Sheriff.*

And after the legal delay had expired the said property was advertised for sale on the 26th day of December, 1878, in the following manner, to wit: "By advertisement, composed in English, announcing the sale to take place at the Merchants' and Auctioneers' Exchange, on Royal street, between Canal and Custom-House street, in the second district of this city, on the 28th day of January, 1879, at 12 o'clock "m." said advertisement were inserted and published in English in a paper in the city of New Orleans, to wit, in the New Orleans Democrat (daily), from the said 26th day of
166 December, 1878, to the day of sale, being full thirty days from the date of the first notice given in said newspaper. Said advertisements were inserted and published in said newspaper on the 26th December, 1878, and 2, 9, 16, 23, & 28 January, 1879. And after having further complied with and performed all the additional previous legal requisites, and after the said property having been duly appraised, did expose the same at public sale according to law, at the said Merchants' and Auctioneers' Exchange, on Royal street, between Canal and Custom-House streets, in the second district of this city, on the said 28th day of January, eighteen hundred and seventy-nine, at 12 o'clock "m.," and having first announced in a loud and audible voice the terms and conditions hereinafter expressed and specified, and having also read *verbatim*,

and in a loud audible voice, the certificate of the recorder of mortgages for the parish of Orleans and city of New Orleans, delivered on the day of sale, and showing the mortgages and liens existing at the time of sale in the name of said defendant against the said property, and also the certificate of the register of convey-
167 ances for the parish of Orleans and city of New Orleans, delivered on the day of sale.

When the same was not sold for want of bidders, at two-thirds of its appraised value, but was again advertised for sale at twelve months credit, according to law, on the seventeenth day of February, 1879, in the following manner, to wit: By advertisements composed in English, announcing the sale to take place at the Merchant- and Auctioneers' Exchange, on Royal street, between Canal and Custom-House streets, in the second district of this city, on the 8th day of March, eighteen hundred and seventy-nine, at 12 o'clock m., said advertisement were inserted and published in English, in a paper, the *the* city of New Orleans, to wit: In the New Orleans Daily Democrat, from said 20 day of February, 1879, to the day of sale, being full fifteen days from the date of the first notice given in said newspaper. Said advertisement were inserted and published in said newspaper on the 20 & 27 January & 6 & 8 March 1870.

And on the said eighth day of March, eighteen hundred and
168 seventy-nine, at the hour of 12 o'clock m., did expose the same at public sale, at auction, having first announced in a loud and audible voice the terms and conditions, hereinafter expressed and specified, and having also read *verbatim*, and in a loud and audible voice, the certificates of the recorder of mortgages and register of conveyances for the parish of Orleans and city of New Orleans, delivered on the day of sale, and bearing even date with the adjudication.

The property consisting of three new dummies, Nos. 1, 2, 3, and of twelve new passenger cars, described under heading No. 10 of the printed extract, herein marked "A," and not offered for sale under this writ, but was subsequently by me sold under the writs issued from the hon. court in suits Nos. 9533, 9366, 9569, 9509, and proceeds of sale in my hands, with the exception of dummy No. 3, the suit of which was stayed for more particular, see my return on said writs.

The property as described in printed extract, herein marked B, being offered for sale—

When Moses Schwartz, being the highest and last bidder
169 for account of Moses Schwartz & Bro., a commercial firm composed of Moses & Louis Schwartz, the property as described in said printed extracts marked "B" was adjudicated in block to the said Moses Schwartz for account of the said M. Schwartz & Bro. for the price and sum of six thousand five hundred dollars ($6,500), payable in the terms and conditions specified in said printed extract, herein marked "B," but by consent of the parties interested in the sale *the purchasers paid* me in cash the full amount of sale, say six thousand five hundred dollars, $6,500.

And which said proceeds of sale were by me distributed and paid

out as follows, as per judgment by this honorable court of date May 5th, 1879:

1st. To the clerk and charges as detailed on reverse hereof			3,100 00
2d. To Horner & Benedict			163 67
3d. To the clerk U. S. dist. court			105 20
4th. To J. R. G. Pitkin			68 50
5th. To J. W. Gurley, register			175 00
6th. To Jack Wharton, marshal			3 50
7th. To S. B. Packard			170 00
8th. To James Todd			50 00
9. To the city of N. Orleans for taxes			2,105 75
			$5,941 62
170 10th. And the balance to Jno. F. Popp	$558 38		
Less charges on rule, viz:			
Clerk's fees	17 10		
Sheriff's "	14 70		
		31 80	31 80
		526 58	526 58
			$6,500 00

This return is made up to the present date to enable the clerk of this hon. court to copy the same in a transcript of an appeal taken, and he is requested to return same after copying.

Sheriff's fee for this writ, $2.00.

Returned up to October 13th, 1879.

(Signed) ERNEST RICKER, *Dy Clerk.*

Notice of Seizure.

In the 5th District Court, Parish of Orleans.

Mrs. Elizabeth Stedtman & *al.* vs. Thomas H. Handy. } No. 9486.

Sheriff's Office, Parish of Orleans,
New Orleans, *Dec.* 17*th*, 1878.

To Thomas H. Handy:

Take notice that I have seized, and in three days from the
171 service hereof shall proceed to advertise and sell according to the law, the following described property, to wit:

See act, made part hereof.

To pay and satisfy the writ issued in this case, say the sum of $9,483 $\frac{33}{100}$, with interest and costs, unless the same is immediately paid.

(Signed) MARION H. MARKS, *Dep. Sheriff.*

And, on the 18th December, 1878, served a copy of the within notice of seizure on Thomas H. Handy, defendant, in person.

(Signed) C. F. DUMESTRE, *Dy Sheriff.*

Document "J." Filed April 3d, 1880. *Offered in Evidence by Counsel for Plaintiff.*

Sheriff's Sale to M. Schwartz & Bro.

Whereas I, J. R. Alcee Gauthreaux, sheriff of the parish of Orleans, by virtue of a writ of seizure and sale to me directed by the honorable the fifth district court for the parish of Orleans, at suit of Mrs. Elizabeth Stedtman *et al. vs.* Thomas H. Handy, No.
172 9486 of the docket of said court, after having fulfilled and complied with all the previous legal requisites, did seize the following described property, towit:

1st. Right of Way.

1st. All the right of way and powers, privileges, and immunities and franchises conferred and granted by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company, under an ordinance number twenty-two hundred and sixty-four, adopted on the fifth day of August, 1873, by the council of the city of New Orleans, and amended by ordinance number twenty-five hundred and forty-eight, adopted March 24th, 1874, by the said council, as will more fully appear by reference to the said ordinances.

2d. The right of way, franchises, and privilege conferred by the said city of New Orleans, through the following streets or avenues of said city, viz: Commencing at the corner of Basin and Canal streets, and thence down to Custom-House street, out Custom-House street to Claiborne street, down Claiborne to Bienville street, down Bienville street to St. Patrick street, to Metairie road,
173 and Orleans avenue, and through the city park to Lake Pontchartrain; thence along the lake shore to Spanish Fort; thence returning along the lake shore and through New Orleans avenue to Bienville street, and up Bienville street to Basin street; thence up the neutral ground in Basin street to Canal street, the place of beginning.

3rd. The right of way and franchises from the Spanish Fort to the shell road, on the upper or west side of the New Canal, and from the said Spanish Fort to the town of Milneburg, with the right granted to said company to place their road-bed on the revetment levee when the same shall be built by the city of New Orleans, the said franchises giving the right of way along the lake shore, from Milneburg to the aforesaid shell road, or what is known as the New Canal, and fully described in the said ordinances.

2. Appurtenances.

4th. The road-beds, or tracks proper, as now laid and constructed through the avenues and streets, hereinbefore described in section second, and comprising all the iron T-rails, bars, and spikes, cross-

ties, grading from Canal street to City Park, the bridge at the
174 lake, bridges along the road, plank crossings through the streets, ballast or road-bed, three turn-tables, frogs and switches, grading and embankments from City Park to lake, gradings and embankments from lake to Spanish Fort, and extra curve, *worth* and turn-outs.

5. Two hand-cars, one passenger car, number one, one open passenger car, one box passenger car, one Remington passenger steam dummy car, and one box car.

3. Miscellaneous Property.

6th. Two hundred and thirty-six rails, more or less, averaging about thirty-two tons, one pilot or cow-catcher, three iron ash-pans, eight iron frogs, four iron draw-heads, four kegs of old iron, two bundles of shingles, fifteen bundles of fish-plates or bars, four turn-table rollers, one keg of bolts, work-bench and tools in tool-house, etc.

4. Real Estate.

7th. A certain square of ground situated in the Faubourg Jackson, in the second district of the city of New Orleans, in the square bounded by Custom-House St., Patrick H. Bienville, and Olympia
175 streets, designated as square number sixty-three, on a plan drawn by John Schreiber, civil engineer, dated March 22d, 1836, and, according to said plan, measuring three hundred feet front on each of said Custom-house and Breuville streets, and two hundred and ninety-seven feet front on each of said St. Patrick and Olympia street, together with the cypress fences and all the buildings and improvements thereon, and all the rights, ways, privileges, servitudes, and appurtenances thereunto belonging or in [any]wise appertaining.

5. Rolling-Stock.

8. The three dummies or engines, known, respectively, as T. H. Handy, "Geo. F. Brott," and "W. H. Bell."

9. One passenger-car, No. eleven, one flat-car, or truck-car, and one iron-tank, together with all the movable property of said road. Being the same property acquired by defendant herein on the fourteenth of July, 1877, at a sale made by John R. G. Pitkin, acting as special master under an order rendered by the honorable the United States district court of Louisiana, dated May 31st, 1877, in the matter of the
176 suit entitled Edward P. Hampston *et al. vs.* Canal Street, City Park and Lake Railroad Company, in bankruptcy, and numbered 1513 of the docket of said court, as more fully appears by an act passed before Joseph A. Quintero, a notary public in this city, dated January 26th, 1878.

And after having given due and legal notice to the said defendant of the said seizure in the manner pointed out by law, I advertised the said before-described property for sale after the expiration of the legal delay from the time of said notice, to wit:

Twenty-sixth day of December, 1878, by advertisement composed in English, announcing the sale to take place at the Merchants' and

Auctioneers' Exchange, on Royal street between Canal and Custom-house streets, in the second district of this city, on the twenty-eighth day of January, 1879, at 12 o'clock m.; said advertisements were inserted and published in English in a paper in the city of New Orleans, to wit, The New Orleans Daily Democrat, from the
177 twenty-sixth day of December, 1878, to the day of sale, being full thirty days from the date of first notice given in said newspaper; said advertisements were inserted and published in said newspaper on the 26th December, 1878, and 2d, 9th, 16th, 23d, 28th January, 1879.

And having further complied with and performed all the additional previous legal requisites, and after the said property having been duly appraised, did expose the same at public sale at auction, according to law, at the said Merchants' and Auctioneers' Exchange, Royal street between Canal and Custom-House streets, in the second district of this city, on the said twenty-eighth day of January, eighteen hundred and seventy-nine, at 12 o'clock m. And at the time and place of sale I did announce, in a loud and audible voice, the terms and conditions of sale, and did read *verbatim*, and in a loud and audible voice, the certificate of the recorder of mortgages for the parish of Orleans and city of New Orleans, delivered on the day of sale; and by which certificate it appears there are no other mortgages standing in the name of said defendant, and re-
178 corded against the before-described property, than the following, to wit:

B. 157, fo. 2; B. 145, fo. 796. Rec'd 7 Dec., '76. The general mortgage, resulting from his bond, in the sum of $50,000, as civil sheriff of the parish of Orleans, per act under private signature, dated 5th December, 1876.

B. 163, fo. 770. Rec'd 31 Jan'y, '78. The mortgage be granted, with vender lien and privilege, by act before J. A. Quintero, dated 2d January, 1878, to secure $18,966.66⅔, interests, costs, & etc.

B. 156, fo. 645. Rec'd 8th Dec., '78. No. 9486. The one in favor of Mrs. E. Stratman *et al.*, resulting from a writ issued by the fifth district court, dated the 17th December, 1878, for the sum of $9,483$\frac{33}{100}$, with interest stipulated in said writ, and costs of suit against said properry.

And *and* the time of sale I did read *verbatim*, and in a loud and audible voice, the certificate of the register of conveyance in and for the parish of Orleans, State of Louisiana, delivered on the day of sale, and by which certificate it does appear that said defendant alienated said before described property, sold to Canal Street,
179 City Park and Lake Railroad Company, on August 15th, 1878, registered in book 109, folio 607.

This reference approved.

(Signed) W. WALSH, *Dy Sheriff.*

When the same was not sold for the want of bidders at two-thirds of its appraised value, but was again advertised for sale at twelve months' credit, according to law, on the twentieth day of February,

1879, in the following manner, to wit, by advertisement, composed in English, announcing the sale to take place at the Merchants' and Auctione-rs' Exchange, Royal street, between Canal and Custom-house streets, in the second district of this city, on [the] eighth day March, eighteen hundred and seventy-nine, at 12 o'clock m., said advertisements were inserted and published in English in a paper in the city of New Orleans, to wit, in the New Orleans Daily Democrat, from the said twentieth day of February, 1879, to the day of sale, being full fifteen days from the date of the first notice given in said newspaper, said advertisements were inserted and published in said newspaper on the 20th, 29th February, 1879, March 6th, 8th, 1879; and on the said eighth day of March, eighteen hundred
180 and seventy-nine, at the hour of 12 o'clock m., did expose the same at public sale at auction, having first announced in a loud and audible voice the terms and conditions hereinafter expressed and specified, and having also read *verbatim*, and in a loud and audible voice, the certificate of the recorder of mortgages and register of conveyances for the parish of Orleans and city of New Orleans, delivered on the day of sale, and bearing even date with the adjudication.

When Moses Schwartz, being the highest and last bidder for account of M. Schwartz and Brother (a commercial firm in the city of New Orleans, composed of Moses Schwartz and Louis Schwartz), the property was adjudicated to the said Moses Schwartz, for account of the said Moses Schwartz and Brother, for the price and sum of six thousand five hundred $\frac{00}{100}$ dollars, payable on the following terms:

This being the second and last auction, the said property will be definat-ly adjudicated to the highest and last bidder for what it will bring, at twelve months' credit, the purchaser to furnish and bond with a good and sufficient security, bearing eight per cent. in-
181 terest per annum from date of sale, and special mortgage on the property sold until final payment; to pay and satisfy the amount of plaintiff's claim—say the sum of nine thousand four hundred and eighty-three dollars and thirty-three and one-third cents, ($9,483.33⅓), with interest thereon at the rate of eight per cent. per annum from the thirtieth day of November, 1877, to the day of sale.

2. The purchaser to assume (to the extent of the amount of his bid) the payment of a promissory note, secured by mortgage on said property, for the sum of nine thousand four hundred and eighty-three dollars and thirty-three and one-third cents ($9,483.33⅓), drawn by defendant to his own order, and by him indorsed, dated on the thirtieth day of November, 1876, and payable two years after date, and bearing interest at the rate of eight per cent. per annum from date until paid.

3. And for the balance of the price of adjudication, if any, the purchaser to furnish bond, with good and sufficient security, bearing eight per cent. interest per annum from date, and special
182 mortgage on the property sold until final payment, said purchaser will have to deduct from the amount of his bid and pay in cash the printing, sheriff's and clerk's fees, keeping, etc., which amount to about twenty-five hundred dollars; and, further-

more, the State, parish, and municipal taxes, the amount of which is not yet ascertained. But, by consent of all parties interested in the above-entitled suit and in the proceeds of sale, the said purchasers have paid in cash the total price of adjudication, say the sum of six thousand five hundred dollars.

Now, therefore, know all men by these presents that I, the said sheriff, in consideration of the premises and by virtue of the laws of the State of Louisiana in such case made and provided, do sell and transfer the said before described property to the said M. Schwartz and Brother, and all the rights and titles which the said defendant had in or [to] the said before-described property:

To have and to hold the same to the said M. Schwartz and Brother, their heirs and assigns, forever.

183 In witness whereof, I have hereunto signed my name, at New Orleans, in the State of Louisiana, this fourth day of April, in the year one thousand eight hundred and seventy-nine, and the one hundred and third year of the Independence of the United States of America.

(Signed) For J. R. ALCEE GAUTHREAUX.
(Signed) W. WALSH, *D'y Sheriff.*

Signed in presence of the following competent witnesses:
(Signed) ERNEST RICKER.
" JAS. T. GLYOM.

Registered in Conveyance Book 111, folio 764.
New Orleans, April 4th, 1879.
(Signed) D. B. PENN, *R. C.*

Recorded in the clerk's office of the fifth district court for the parish of Orleans in Deed Book 22, folio 371 to 376, inclusive.
New Orleans, April 5th, 1879.
(Signed) JNO. J. HANNAN, *D'y Clerk.*

184 *Order Case Submitted.*

Extract from the Minutes.

SATURDAY, *April 3d*, 1880.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY *vs.* GEORGE DELAMORE & *al.* } No. 10324.

This cause came on this day for trial.

Chas. S. Rice, Breaux, Fenner & Hall, for plaintiffs; W. S. Benedict, for defendant.

When, after hearing pleadings and evidence, said cause being submitted, the court took the same under advisement, with leave to file briefs.

Reasons for Judgment. Filed June 29th, 1880.

In the suit of Elizabeth Stratman *vs.* Handy, No. 9486 of the

docket of this court, Moses Schwartz became the purchaser of all the rights and franchises of the Canal Street, City Park and Lake Railroad Company, which he subsequently sold to the New Orleans, Spanish Fort and Lake Railroad Company.

185 The position that the bankruptcy of the original company protected its franchises and vested them in the original donor is not sustained by the law: as a consequence, whatever right or franchises that company possess under ordinances 2264, 2548, and 3146 of the city council was acquired by Handy at the bankruptcy sale, and by him sold, subject to mortgage conveyed by virtue of execution in the suit of Mrs. Stratman.

The only effect that can be given to the subsequent ordinance 4523 of the city of New Orleans, of the 21st of May, 1878, if it has any effect at all, is that it granted a parallel right of way to the said Canal Street and City Park R. R. Co.

To give it any other effect would be to decree that the city had undertaken to make a new grant of a franchise already granted, which, under the law, would not be permis-able. In so far, therefore, as the petition of the present plaintiff are concerned, all that they can ask is that this court shall assure to them the rights of the purchase from Moses Schwartz, and which are distinctly set forth in the sheriff's title to them.

186 The court is of opinion that said plaintiffs are entitled to a judgment perpetuating the injunction herein, recognizing them as the owners of the right of way, powers, immunities, and franchises created by the city of New Orleans to the Canal Street, City Park and Lake Railroad Company, under and by virtue of ordinances No. 2264, adopted August 5th; 1873, 2548, adopted March 24th, 1874; and 3146, adopted June 15th, 1875; and that the said George Delamore be perpetually enjoined from interfering with said plaintiff in the full ownership and enjoyment of said franchises, whether he make said claim by virtue of ordinance 4523, or for any other reason. I am of opinion that the pavillion situated on the left bank of the Bayou St. John, at or near the entrance thereof, in Lake Pontchartrain, and now occupied by old Francois as a refreshment saloon, is still the property of the Canal Street, City Park and Lake Railroad Company, and is subject to the seizure levied by said George Delamore.

187 That the said Moses Schwartz and that the New Orleans and Spanish Fort, and Lake Park Railroad Company acquired no title to the same by virtue of their purchase from Mrs. Micas; that the property upon which the said pavillion is situated can be in no sense considered as a batture or an accretion inuring to the benefit of the said Micas property.

The testimony in this case shows all the land in that neighborhood to have been made artificially, and not from natural formation, which would justify the plaintiffs in making a claim.

It is therefore ordered, adjudged and decreed, that the injunction issued in this case be perpetuated, restraining and prohibiting the said George Delamore from seizing and selling the rights and franchises now enjoyed by the New Orleans, Spanish Fort and Lake

Railroad Company, which they acquired from said Moses Schwartz, or in any manner interfering with them, by virtue of any ordinance or authority of the city of New Orleans, and that they be quieted in the enjoyment and possession of the said road, right of way, power, privileges, immunities, and franchises now enjoyed by them, and conferred upon them by an ordinance of the city of New Orleans.

188 It is further ordered that the writ of injunction in so far as it restrains the seizure and sale of the construction or building known as a pavillion, situate on the left bank of the Bayou St. John, at or near the entrance thereof, into Lake Pontchartrain, and now occupied by old Francois as a saloon, with the small houses attached, be dismissed, and the same declared subject to the seizure of George Delamore.

It is further ordered that the New Orleans, Spanish Fort and Lake Railroad Company pay costs of suit.

Judgment.

Fifth Dist. Court.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD CO. *vs.* GEORGE DELAMORE, *et al.* } No. 10324.

In this case, for the reasons assigned in the written opinion of the court this day delivered and on file—

It is ordered, adjudged, and decreed that the injunction issued in this case be made perpetual, restraining, and prohibiting

189 George Delamore from seizing, and selling the rights and franchises now enjoyed by the New Orleans, Spanish Fort and Lake Railroad Company which they acquired from Moses Schwartz, or in any manner interfering with them, by virtue of any ordinance or authority of the city of New Orleans, and that they be quieted in the enjoyment and possession of the said road, right of way, powers, privileges, immunities, and franchises now enjoyed by them, and conferred upon them by an ordinance of the city of New Orleans.

It is further ordered that the writ of injunction in so far as it restrains the seizure and sale of the construction or building known as a pavillion, situated on the left bank of the Bayou St. John, at or near the entrance thereof, into Lake Ponchartrain, and now occupied by Old Francois as a saloon, with the small houses attached, be dismissed, and the same declared subject to the seizure of George Delamore.

It is further ordered that the New Orleans, Spanish Fort and Lake Railroad Co. pay the costs of suits.

Judgment rendered June 29th, 1880.

Judgment signed July 3d, 1880.

190 (Signed) W. H. ROGERS, *Judge.*

Petition for Appeal. Filed 15th July, 1880.

N. O., SPANISH FORT AND LAKE RAILROAD CO. } No. 10324.
vs.
GEORGE DELAMORE & *al.*

To the honorable the judge of the fifth district court for the parish of Orleans:

The petition of the New Orleans, Spanish Fort and Lake Railroad Company herein appearing by President M. Schwartz, respectfully shows:

That petitioner is aggrieved by the final judgment against him rendered herein on the 29th day of June, 1880, and signed on the 3rd day of July, 1880, and desires a suspensive appeal therefrom to the supreme court of the State of Louisiana. Wherefore petitioner prays that he be allowed a suspensive appeal from said judgment, upon executing and filing bond in such sum as the court may fix with good and solvent security thereon conditioned as the law
191 requires, and that said appeal be made returnable to the supreme court on the first Monday of November, 1880. He prays also that all parties in interest be duly cited to answer. Petitioner prays also for all general relief.

(Signed) BREAUX, FENNER & HALL,
AND CHAS. S. RICE,
Of Counsel.

Order.

Let a suspensive appeal be granted herein, made returnable to the supreme court of Louisiana on the first Monday of November, 1880, upon petitioner furnishing bond, with good and solvent security, in the sum of five hundred dollars, conditioned as the law directs.

New Orleans, 15th July, 1880.

(Signed) W. H. ROGERS, *Judge.*

Service accepted for Geo. Delamore.

(Signed) W. S. BENEDICT, *Att'y.*
WM. WALSH,
July 16th, 1880. *Deputy Sheriff.*

192 *Bond. Filed 15th July,* 1880.

Know all men by these presents, that we, New Orleans, Spanish Fort and Lake Railroad Company, M. Schwartz, president, as principal, and F. E. Foucher, as surety, are held and firmly bound unto Thomas Duffy, clerk of the fifth district court for the parish of Orleans, his successor, executor, administrator, and assigns, in the sum of five hundred dollars, for the payment whereof, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated in the city of New Orleans, on this 15th day of July, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above bounded New Orleans, Spanish Fort and Lake Railroad Company this day filed a petition of appeal from a final

judgment so far as rendered against said petitioner in the matter of the New Orleans, Spanish Fort and Lake Railroad Company *vs.* Geo. Delamore & *al.*, No. 10324 of the fifth district court for the
193 parish of Orleans, on the 29th day of June, 1880, and signed on the 3d day of July, 1880:

Now, the condition of the above obligation is such that the above bound New Orleans, Spanish Fort and Lake Railroad Company shall prosecute its appeal, and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise, that the said surety shall be liable in its place.

(Signed) NEW ORLEANS, SPANISH FORT AND LAKE R. R. CO.,
M. SCHWARTZ, *President.* [SEAL.]
F. E. FOUCHER. [SEAL.]

Petition of Appeal. "*Geo. Delamore.*" *Filed July 16th*, 1860.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD CO.
vs.
GEORGE DELAMORE & *al.*
No. 10324.

The petition of George Delamore, defendant herein, with respect represents:

194 That a final judgment has been rendered against him maintaining in fact the injunction herein sued out; that same was signed on 3rd July, 1880, and contains error to prejudice of petitioner; and he is aggrieved thereby, and is desirous of appealing therefrom.

Wherefore he prays an appeal be allowed him therefrom, returnable in the supreme court on the first Monday of November next, and that all persons in interest be cited to answer, on his giving bond as required by law and order of court.

And he prays for general relief, &c.

(Signed) W. S. BENEDICT, *Att'y.*

Service accepted and citation waived.

(Signed) CHAS. S. RICE,
Att'y for Plaintiff.

Order.

Let a suspensive appeal be granted herein, made returnable to the supreme court of Louisiana on the first Monday of November, 1880, upon petitioner's furnishing bond, with good and solvent security, in the sum of five hundred and fifty dollars, conditioned as the law directs.

New Orleans, July 16th, 1880.

(Signed) W. H. ROGERS, *Judge.*

195 *Bond. Filed 16th July*, 1880.

Know all men by these presents, that we, George Delamore, as principal, and Wm. McQuoid, as surety, are held and firmly

bound unto Thomas Duffy, clerk of the fifth district court for the parish of Orleans, his successors, administrators, and assigns, in the sum of two hundred and fifty dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seal- and dated in the city of New Orleans, on the 16th day of July, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above bound George Delamore has this day filed and entered a petition of appeal from a final judgment rendered against him in the matter of the New Orleans, Spanish Fort and Lake Railroad Company, No. 10324, in the fifth district court for the parish of Orleans, on the 29th day of June, 1880, and signed on the 3rd day of July, 1880:

196 Now, the condition of the above obligation is such, that the above bound George Delamore shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real and personal, if he be cast in the appeal; otherwise, that the said surety shall be liable in his place.

(Signed) GEO. DELAMORE. [SEAL.]
WM. McQUOID. [SEAL.]

Clerk's Certificate.

Fifth District Court for the Parish of Orleans.

STATE OF LOUISIANA:

I, Thomas Duffy, clerk of the fifth district court for the parish of Orleans, do hereby certify that the foregoing one hundred and ninety-three pages do contain a true and correct transcript of all the pleadings had, documents filed, testimony and evidence adduced in the case wherein The New Orleans Spanish Fort and Lake Railroad Company are the plaintiffs and Geo. Delamore *et al.* are defendants, No. 10324 of the docket of this court.

197 In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this twenty-eighth day of July, and in the year of our Lord one thousand eight hundred and eighty, and in the one hundred and fiftth year of the Independence of the United States of America.

[SEAL.] (Signed) THOMAS DUFFY,
Clerk of the Fifth District Court for the Parish of Orleans.

(Here follows diagram, marked p. 197.)

Charter "C." Filed April 3d, 1880.

Be it known that on this nineteenth day of May, eighteen hundred and seventy-three, before me, Theodule Buisson, a notary public for the parish of Orleans and the city of New Orleans, therein residing, personally came and appeared Messrs. George Fuller Brott, William Henry, Benjamin Simpson Harrison, Louis Gagnet, Joseph Sands Smith, Richard Mark Harrison, and Thomas Hasam, all resi-

dent- of this city, who severally declare that, availing themselves of the provisions of the laws of the State of Louisiana, authorizing and regulating the organization of corporations for works of public improvements and for other purposes, they have agreed, and by these presents do covenant and agree and bind themselves and those they represent, to form themselves into and constitute a corporation under the following, which they adopt as their charter:

198

Article "First."

The corporate name of this company shall be The Canal Street, City Park, and Lake Railroad Company. It shall, have a seal with the corporate name of this company engraved thereon.

Article "Second."

The domicile of this company shall be in the city of New Orleans; the charter shall remain in full force for the space and term of twenty-five years, and the corporation shall have right of succession. The president of the company shall be the officer on whom citations and other legal process shall be served, and in his absence the vice president.

Article "Third."

The object and purposes for which this corporation is established is to construct and operate a railroad from Canal street to Lake Pontchartrain; thence along the lake shore, as provided in an ordinance of the city of New Orleans No. 1683, administration series, and the amendments which have been thereto, or may hereafter be made, granting the right to construct and operate said road to George F. Brott and his associates.

199

Article "Fourth."

The capital stock of said company is hereby fixed at two hundred thousand dollars, to be represented by two thousand shares of one hundred dollars each, which may be increased by a vote of a majority of the stockholders, at a meeting called for that purpose, to a sum not exceeding four hundred thousand dollars. No person shall subscribe to more than one-fifth of the capital stock. All stock subscribed for shall be paid at the time and in the manner following, to wit, five per cent. at the time of subscribing, and the remainder in installments, not to exceed twenty-five per cent. of any subscription, when called for by the board of directors, after giving ten days' notice in one or more of the daily papers published in the city of New Orleans. In default of the payment of any installment, as herein provided, the board of directors may declare the said stock and the payments made thereon forfeited to said company, and may authorize said stock so forfeited to be again subscribed for, or otherwise dispose of the same, as they may deem for the interest of the company.

200

Article "Fifth."

The charter may be altered and amended by the consent of three-

fourths of the stockholders, convened for that purpose, after thirty days' notice in two of the daily newspapers published in the city of New Orleans.

Article "Sixth."

All the powers of the corporation, except as herein limited, shall be vested in a board of directors, composed of seven stockholders, four of whom shall constitute a quorum, each holding at least fifty shares of the capital stock of the corporation; and no stockholder shall be eligible as a director unless he has held fifty shares in his own name at least sixty days prior to said election: provided, however, that until the next election of directors under this charter the board of directors shall be composed of the subscribers to this act, who shall at their first meeting elect out of their number a president and vice-president, who shall, together with the direc-
201 tors, hold their office until their successors are elected and qualified, in accordance with the provisions of this act.

Article "Seventh."

On the first Monday in January, eighteen hundred and seventy-four, and annually thereafter, fifteen days' previous notice being given in two of the daily newspapers published in the city of New Orleans, an election of directors for the ensuing year shall be held by the stockholders at the office of the company, and a plurality of the votes cast, counting one vote for each share of stock voted on, either by the owner thereof or by his proxy, shall be sufficient for the election of a director; and if, from cause, said election should not be held at the time for which notices were given, the meeting of stockholders may be adjourned to fifteen days thereafter, and, if necessary, continue to adjourn for fifteen days until an election is effected, notice being published as heretofore provided for. It shall be the duty of the president to preside at all meetings of the board. In case of his absence or inability to act, the vice-president shall perform all of the duties of the president, and shall be vested with the same power.

202 Article "Eight."

The board of directors shall have power to fill any vacancy that may occur among the directors from death, resignation, absence, or otherwise. They shall elect a secretary or treasurer and all other officers, clerks, and agents of the corporation which they may deem necessary; shall define their duties, fix their salaries, and remove them at pleasure. The board may grant for the transaction of business of the corporation to committees of their body as to their officers or agents such power as they may deem expedient, and may also appoint agents within or without the State of Louisiana under such conditions as to the said board may seem proper, and the board shall have full power to make by-laws, rules, and regulations, and to alter and amend the same whenever they consider it necessary. Minutes of the proceedings of the board of directors shall be kept by the secretary and signed by the president.

Article "Ninth."

No stockholder of this corporation shall ever be liable or responsible for contracts or faults of this corporation, nor shall any
203 more informality in its organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the amount of his stock.

Article "Tenth."

The liquidation of the affairs of this corporation shall be made by three commissioners appointed by the stockholders from among their own numbers, at a meeting convened for that purpose, after thirty days' previous notice in two newspapers published in the city of New Orleans.

The duty of said commissioners shall be to liquidate finally all the business of the corporation on such terms and in such manner as shall be determined at the meeting by a majority of the stockholders present or represented; and if, at a time prior to the termination of this charter, two-thirds of the stock in amount shall at any meeting of stockholders called for the liquidation of the affairs of this corporation elect commissioners and determine the mode and manner in which said liquidation is to be made, then the liquidation shall be made immediately.

This done and passed in my office at New Orleans aforesaid, on this nineteenth day of May, eighteen hundred and seventy-
204 three, in presence of Joseph Cuvellier and George Guinault, competent witnesses residing in this city, who have signed these presents, together with the appearers and me, notary, after a due reading of whole.

Original signed:

GEO. F. BROTT.
J. S. SMITH.
R. M. HARRISON.
BENJ. S. HARRISON.
LOUIS GAYNET.
WILLIAM HENRY.
THEO. HASAM.
JOSEPH CUVELLIER.
GEO. GUINAULT.
TH. BUISSON.

(Signed) TH. BUISSON,
Notary Public.

I, the undersigned, deputy recorder of mortgages for the city and parish of Orleans, State of Louisiana, do hereby certify that the within copy of act of incorporation was this day duly recorded in my office according to law, in B. S. 9, folios 153, 154, and 155.

C. DARCAUTIL,
Deputy.

New Orleans, May 21st, 1873.

City Ordinance. *Filed April 3d*, 1880.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *August 6th*, 1873.

[No. 2264, Administration Series.]

An ordinance granting the right for a railroad from the
205 neutral ground on Basin street, at the junction with Canal street, in the second district of the city of New Orleans, to Lake Ponchartrain, with privilege of extending the same along said lake shore.

Be it ordained that the right of way be, and is, hereby granted to the Canal Street, City Park and Lake Railroad Company, to lay a single or double-track railroad, provided a double-track be laid from Basin to Broad street, with the necessary turnout, switches, turntables, through the following streets: Commencing on the neutral ground on Basin street, second district, at its intersection with Canal street, thence along Conti street to Bernadotte street, thence on the embankment along the western or upper side of the Orleans canal to the lake shore, with the privilege of extending said railroad along said lake shore to new canal bayou, St. John and Milneburg, with the privilege of constructing said railroad upon the lake shore levee when completed. That the rights and privileges be, and are, hereby granted for the term of twenty-five years from the date of the passage of this ordinance upon the following conditions:

Article I.

206 The rails used in the construction of said road shall be of the T rail pattern, and to weigh at least twenty pounds to the yard, and to be laid on cross-ties; provided, however, that the rail will be laid in such a manner as to allow a free passage of vehicles along and across the rail from Basin to Broad street, and on every street of the route whenever the street shall be graded and curbs set by the city authorities.

Article II.

The lines and levels of the road to be located and marked by the city surveyor, approved by the council; the lumber and materials used in the construction of said road and bridges to be approved by, and the road to be constructed under the supervision of, the administrator of improvements and the city surveyor; and that, should it ever be deemed necessary to lower or change the grade of any part of said railroad, the same shall be done at the expense of the company: provided, the company shall not be required to grade any more than may be required to lay their track or tracks.

Article III.

The company may use either Remington car and engine, Lamms'
thermo-specific engine, or such other as may be approved by
207 the council, or horse or mule power.

Article IV.

The rate of fare from Canal street to the City Park, or for any intermediate distance, shall not exceed five cents for each passenger, and from the City Park to the lake, new canal, and Bayou St. John, or for any intermediate distance, the fare shall not exceed five cents for each passenger. The same rate for returning. The fare on the lake-shore levee shall not exceed five cents for any distance, going or coming.

Article V.

The rate of speed not to exceed six miles per hour, from Basin street to Broad street: Provided, That the rate of speed on any part of the road may hereafter at any time be limited by the city council to six miles per hour, and that the council may prescribe rules and points for landing and receiving passengers; and the said grantee shall run one car at least every hour, from each end of the road, from 6 a. m. until 9 p. m., and from April to September run a car every hour from 9 p. m. until 12 p. m.

VI.

The road, cars, and fixtures are to be assessed and made to pay an annual tax as other property of like value.

208

VII.

On the expiration of said right of way the road, rolling stock, equipments, depots, and fixtures may be taken by the city at an appraised value, to be ascertained in the following manner: Two disinterested persons, one to be appointed by the city and the other by said grantee, shall fix said value, and in the event of disagreement, an umpire shall be selected by said two appraisers, whose decision shall be final: Provided, That when the said two appraisers fail to agree upon an umpire, he shall be selected by a judge of one of the district courts of the parish of Orleans.

Article VIII.

That the said grantee shall keep such portions of the streets and public places as may be occupied by the tracks, side tracks, turnouts, turn-tables, and switches in good order and condition from curb to curb.

Article IX.

The work of construction of said railroad shall commence within thirty days after the passage of this ordinance, and be completed from Canal and Basin streets to the lake shore, and in running order,

209 within twelve months from and after the passage of this ordinance. In case the road is not commenced, completed, and in actual operation within the time specified, the rights and privileges herein granted shall be null and void; and that part of road from the mouth of Orleans canal to the New canal, and from the mouth of the Orleans canal to Milneburg shall be completed and in actual operation within two years from the passage of this

ordinance, under penalty of the forfeiture of the right of way for such portion of the road not completed along the lake shore. The city, however, agrees to complete the excavation of Orleans canal on the west bank, and shall not put the said company in default until after the completion of said excavation.

Article X.

That nothing in this ordinance or in the grant of right of way, or other rights, or in the notarial act made in pursuance of this ordinance, shall be construed as binding to the city of New Orleans, or making the said city liable, directly or in warranty, for any claims of citizens or corporations, on account of said ordinance, grant, or notarial act, or any claim for infringement of rights or damages to persons or property caused by the grantee, or in any way re-
210 sulting from the construction and operation of the said railroad by the said grantee, nor for any claims for damages, losses, or injuries sustained by the said grantee, or their successors or assigns, in case they should be deprived of their rights, or be interfered with in the exercise thereof, by any person whatsoever, save it be by the lawfully constituted authorities of the city; nor shall the said city be liable for any work done or materials used in paving or repairing streets in pursuance of this grant, or under the direction of and contract with said grantee.

Article XI.

That nothing in this grant or privileges granted shall be construed as authorizing said grantee the right or privilege of erecting any depots, sheds, or station-houses or buildings without plan or sites of the same be submitted to the council for their approval.

Article XII.

That ordidance No. 1683, administration series, granting George F. Brott and his associates the right to construct a railroad, etc.; also ordinance No. 1843, administration series, amending the same, and all other ordinances bearing on this subject, are hereby repealed, and that the said grantees shall accept and agree to all
211 the provisions of this ordinance by filing with the mayor a certificate of acceptance within ten days after the passage of this ordinance, and failing therein, this ordinance to be null and void.

Be it further ordained, etc., That this ordinance shall take effect from and after its passage.

Adopted by the council of the city of New Orleans August 5, 1873. Yeas—Messrs. Brewster, Calhoun, Fitzeurester, Shucken, Turnbull.

(Signed) LOUIS A. WILTZ, *Mayor.*

A true copy.

DANIEL SCULLY, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March 25th*, 1874.

[No. 2548. Administration Series.]

Be it ordained, That ordinance No. 2264, administration series, granting the right of way for railroad to the Canal Street, City Park and Lake Railroad Company be, and is hereby, so amended as to read as follows: That the right of way be, and is hereby, granted to the Canal Street, City Park and LakeRailroad Company to lay sin-
212 gle and double-track, passenger and freight, railroad through the following named streets, to wit: Commencing on the neutral ground on Basin street, second district, at its intersection with Canal street; thence along said neutral ground to Conti street; thence in Conti street to Claiborne street; thence in Claiborne street to Bienville street; thence in Bienville street to Bernadotte street; thence in Bernadotte street to west bank of Orleans canal; thence along and on the west of Orleans canal; thence along and on the west bank of Orleans canal to May street (near the lake shore); thence in May street to Genois street; thence thence in Genois street to Bayou St. John, returning by another track through Genois and May streets to west bank of Orleans canal; thence on west bank to intersection of Bernadotte street and Metairei road; thence along Metairie road to Anthony street; thence in Anthony street to Bienville street; thence in Bienville street to Basin street; thence in Basin-street neutral ground to starting point at Canal street.

Adopted by the council of the city of New Orleans March 24, 1874.

(Signed) LOUIS A. WILTZ, *Mayor.*

A true copy.

DANIEL SCULLY, *Secretary.*

213 UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

Proceedings had in the supreme court of the State of Louisiana in the case entitled—

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY
vs.
GEORGE DELAMORE. } No. 8035.

On appeal from the fifth district court for the parish of Orleans.

Transcript of Appeal.

Filed Nov. 2, 1880.
(Signed) EMILE DUPRÉ, *Dy Clerk.*

Order for Summary Docket. Filed December 29th, 1880.

NEW ORLEANS, SPANISH FORT AND LAKE R. R .Co.
vs.
GEORGE DELAMORE. } No. 8035.

The clerk will please enter this — an injunction case on the summary docket.

(Signed) W. S. BENEDICT, *Att'y.*

214 *Order to Submit. Filed May 3d,* 1881

NEW ORLEANS, SPANISH FORT AND LAKE R. R. COMPANY
vs.
GEORGE DELAMORE. } No. 8035.

The clerk will please submit on briefs for defendant in above case, if reached.

W. S. BENEDICT, *Att'y,*
Per P. H. DOWNING.

Cause Continued.

Extract from the Minutes.

TUESDAY, *May 3d,* 1881.

The court was duly opened.

Present: Their honors, Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY
vs.
GEORGE DELAMORE. } No. 8135.

This case was ordered by the court to be continued with preference.

Order to Submit. Filed November 22, 1881.

215 NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY
vs.
GEORGE DELAMORE. } No. 8035.

GEORGE DELAMORE
vs.
CANAL ST., C. P. & LAKE RAILROAD COMPANY.

The clerk will please submit this cause on briefs filed for Geo. Delamore, with ten days' time to reply to R. R. Co.'s brief when filed.

(Signed) W. S. BENEDICT, *Att'y.*

Cause Submitted.

Extract from the Minutes.

TUESDAY, *November* 22, 1881.

The court was duly opened.

Present: Their honors, Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

NEW ORLEANS, SPANISH FORT & LAKE R. R. Co. *vs.* GEORGE DELAMORE. } No. 8035.

This case was called for trial, and having heard argument from Gus. A. Breaux, Esq., of counsel for plaintiff and appellee, the court took the cause under advisement upon the briefs on file and to be filed on or before the 2d proximo.

Mr. Justice Fenner recuses himself in this case.

216 *Opinion of the Court. Filed December 19th*, 1881.

N. O., SPANISH FORT AND LAKE R. R. Co. *vs.* GEORGE DELAMORE. } No. 8035.

The plaintiff has enjoined the defendant from judicially settling a frame structure at the Spanish Fort, on the Pontchartrain Lake shore, and a franchise granted by municipal ordinance, of the rights of way from a central point in the urban part to said Fort & shore.

The ground of opposition to the seizure is, that the building and the right of way belong to the plaintiff, and not to defendant's judgment debtor. The defences are, that the structure is not on plaintiff's land, was not constructed by plaintiff, or any one for its account, and that the right of which was granted by the city of New Orleans to defendant's judgment debtor has never passed to plaintiff, & still is the property of that debtor.

There was judgment decreeing the building to belong to defendant's debtor and the franchise to have enured to the plaintiff,
217 and not to be liable to the seizure effected of it.

From the judgment so rendered both litigants appeal.

For a proper understanding of the merits of the case, a clear knowledge of the established facts, in their chronological order, is of great value.

On the 19th of May, 1873, a corporation, styled "The Canal Street, City Park and Lake Railroad Co.," was created by ordinances 2264, 2548, and 3146. A right of way was granted it by the municipal council to extend from the neutral ground, on Basin street, near Canal street, in the second district of New Orleans, through a determined route to the lake shore, at the Spanish Fort.

This company went into bankruptcy, and on the 29th of November, 1876, the property surrendered was ordered to be sold, part cash and part on credit, with vender's lien and mortgage. The ad-

vertisement described the railroad, main track, and branches, the stations, the buildings, car fixtures, stock, and other effects, and all the *franchise* of the company.

On the 14th of July, 1877, at the sale an adjudication was
218 made to T. H. Handy—part cash & part on time—the notes to be secured by vender's lien and special mortgage, with the clause *de non alienando*.

This sale was confirmed by the bankrupt court at its November term, and an act of sale was ordered to be executed by the special master, which was passed on January 26th, 1878, describing what purported to have been sold, including the franchises or right of way granted by the city.

On the 31st of January, 1878, another corporation, by the same name as the defunct one, was formed for like purposes.

On the 22d of May, 1878, the city council granted to it by ordinance 4523 rights similar to those previously conceded to the first company. On the 15th of August, 1878, Handy assumed to transfer to the company all the property which he had acquired on the 14th of July previous, on assumption by the corporation of his debts & liabilities, as adjudicatee & purchaser.

Subsequently one of the notes thus assumed having matured & remaining unpaid, executory process issued; the property affected was seized, and on the 8th of March, 1879, was adjudicated to Moses Schwartz & Bro.

219 On the 31st of March, 1879, another corporation, the present plaintiff, was formed for objects similar to those which the previous corporation had proposed to carry out.

On the 9th of April, 1879, Schwartz Bro-. transferred to it the property and in terms the purchase also.

On the 25th of October, 1879, the defendant Delamore, who had obtained judgment against the second corporation, levied his writ on the frame building already mentioned, known as the "pavillion," & on the right of way granted that corporation by the city by ordidance 4523, adopted May 25th, 1878.

The questions presented are:

1st. Whether the pavillion belongs to the plaintiff.

2d. Whether the franchises or right of way first granted by the city to the first company passed to Handy; whether they next were transferred by him to the second company; whether they, or those conferred by ordinance 4523, afterwards passed from it, under the executory proceedings to Schwartz & Bro.; and whether they were finally transferred by the latter to the present plaintiff.

220 1st. We do not think it necessary to decide presently whether the soil on which the "pavillion" was built formed part of the realty which the plaintiff acquired from Schwartz & Bro. The contention is not about that soil, but about the building.

The evidence shows that the structure was connected with plaintiff's undisputed land, and was for its exclusive use. That it had been put up for his purposes by a third party before the plaintiff had acquired any existence, and that it was finished or completed by the second company.

We hear no complaint in this suit, either from such party or from such company, unless it be through Delamore championing its rights. The building was in existence, &, such as it is, attached to & in the use of the land, when the writ was executed against the company. The advertisements included the land and all its accessories.

By the adjudication to Schwartz & Bro. the pavillion passed from the company to them, and it afterwards was transferred by them to the plaintiff, who therefore owns it, to the exclusion of the creditors of the company, who had not previously expropriated it.

221 2d. The right of way granted by the city to the first company was not transferred to its creditors. It did, not therefore, pass to Handy at the bankruptcy sale. It had reverted to the grantor. Handy, who had not therefore acquired it, did not encumber, and did not transfer it to the second corporation, which consequently never owned it. (2 Kent, E. 1867, p. 333 & note.)

The city authorities granted the second corporation a similar right of way, which was *accepted* by it.

This acceptance negatives the theory that this corporation acquired the right of way adjudicated to Handy at the sale of the assets by the special master.

This right of way granted by the city to the second company, by ordinance No. 4523, was never mortgaged at all by it, still less seized and sold.

The plaintiff claims that the grant was a superfluity; but this is not so. As the first right of way was not surrendered, was not sold, was not transferred to the second company, but had reverted to the city, it was not sold to Schwartz & Bro., who did not therefore acquire, and did not sell it to the plaintiff.

222 The second company was entitled under the general laws of the State, and had the right to "borrow money" for the construction or repairs of the road.

"For that purpose" it could issue bonds and secure them by mortgage upon the franchises and all the property belonging to it. R. S., 692, 693, and 2396; Redfield II, 408.

Had it done so, and on its failure to pay, had the property and franchises encumbered been sold, the purchaser would have stepped in its place, and would have acquired and held both.

But the company had no right when it made the purchase from Handy to secure the price of sale, as it did in the franchise, which was inalienable.

It did not mortgage for any purpose the franchises or right of way conceded by ordinance 4523.

It could have mortgaged the franchise, and thus made it liable to seizure and sale and transfer, if the mortgage had been consented to, —secure the payment of money borrowed for the construction or repairs of the road. It has not done it, and what was otherwise done is of no effect.

223 It is settled by numerous authorities that the franchises & corporate rights of a company, & the means vested in them which are necessary to the existence and maintenance of the object

for which they were created, are incapable of being granted away and transferred by any act of the company or by any adverse proceeding, unless with the consent of the donor or grantor formally expressed. In the absence of any provision to that effect, either in the general law or in the charter, it is settled that the franchise cannot be levied upon for debt.

The argument is unwholesome that the statute which authorizes the mortgage of the franchise in certain cases was designed merely to make the franchise mortgageable, which, otherwise, not being a real right, would not be so. The intent of the law may have been such, but the main object was to make the franchise transferable, as without such a law, it would not be so.

The franchise, so termed in this case, is nothing more than a right of way. The franchise proper is the right to become a corporation, and when such exist and operate.

The right of way is an incident growing out of such exist-
224 ence, and which determines with the extinction of corporate life. It is a personal servitude, the exercise of which was confined to the grantee in default of stipulation to the contrary, & which is dissolved when the grantee ceases to exist or forfeits the right to enjoy it. R. C. C., 722, 821.

The grant or license conferred by the municipal ordinance was a mere right of way. It does not come within the definition of a franchise, which the city could not confer, and which derive only from sovereign dispensation. 73 Ill., 548; 4 Kernan, 506.

A corporation is an artificial being, which the law alone can create. When created, it cannot transfer its own existence into another body, nor can it enable natural persons to act in its name, except as its agents. The franchise to be a corporation is therefore not a subject of sale and transfer, unless the law by some positive provision has made it so & pointed out the modes in which such sale and transfer may be effected.

When the sovereign covenants & agrees that a certain corporation shall administer certain franchises, its ordinary judgment
225 creditors may sell its property, but not its franchise. They are beyond the reach of an ordinary execution. It is a State prerogative to put the administration of its franchises into such hands as it may choose. These franchises cannot be transferred to other hands without the consent of the grantor. Neither the franchise nor the right of way could be transferred. Hence neither has passed at the bankruptcy alleged sale thereof.

If neither passed to Handy, he transferred nothing to the second company, which having acquired none, transferred none to Schwartz & Bro., who having purchased none, conveyed none to the plaintiff.

We do not understand the plaintiff as claiming any other title from Schwartz & Bro., than such as they may have acquired from the second company at the seizure and sale brought about by the non-payment by it of the obligations of Handy assumed by it, on the sale from Handy to it of the franchise said to have been acquired at the marshal's sale in the bankruptcy proceedings. The plaintiff does not claim to have acquired through its author the right of

way granted by the city to the second company by municipal ordinance.

226 The petition repudiates the idea that the second company acquired the right of way otherwise than from Handy, and by him in the bankruptcy proceedings of the first company. 2d Kent, Ed. 1867, p. 333, note.

Steuart *vs.* Jones, 40 Mo., 140; Susquehanna Canal Co. *vs.* Bonham, 9 Wats & S., 27 (Pa.); Arthur *vs.* Commercial B'k, 9 Smed. & M., 394 (Miss. Ct. of Appeals); Randolph *vs.* Larned, N. J. Ct. of Errors, 27, N. J., Eq., 557; 73 Ill., 541; 28 L. A., 222; 93 U. S., 222; 12 How., 40; 10 Allen, 448; 2 Kent, 305, 307, 284; Angel & Ames on Corp., ed. 1875, Sec. 101, p. 163 to 165, and notes; Redfield on R. W., 2d ed., 1869, p. 462, 466, 478, 491, 553, and notes.

Whether the right of way under ordinance 4523 has continued to exist and vests in the second company, is a question which we will not assume to determine in the present controversy. When the question will be presented in proper form, and between the proper parties, we will determine whether the right of way was or not a franchise, was or not a license, was or not personal and intransmissible, reverted or not to the city.

227 All we are called upon to determine is whether it was or not acquired by the plaintiff, who has in his suit asserted title to it. That question we answer in the negative. 44 N. H., 127; 8 Gray, 575; 73 Ill., 541.

We wish to be understood as not deciding whether or not that right of way exists & vests in defendant's judgment debtor.

It is therefore ordered and decreed that the judgment appealed from be reversed, and proceeding to render such judgment as should have been rendered. It is ordered, adjudged, & decreed that the injunction herein issued be perpetuated as to the frame building known as the "pavillion," and that in other respects it be dissolved, and that plaintiff's demand be rejected, the cost of appeal to be paid equally by the appellants.

Mr. Justice Fenner recuses himself, having been of counsel.

Rehearing Refused.

Justice Todd dissents on rehearing, & thinks there hearing should be granted, and Mr. Justice Levy concurs with the chief justice and Mr. Justice Poché in refusing the rehearing.

228 NOTE.—I concur with the chief justice and Mr. Poché in refusing the rehearing applied for in this case.

New Orleans, 15 May, 1882.

(Signed) WILL'M M. LEVY,
Associate Justice.

Filed May 15th, 1882.

(Signed) T. McC. HYMAN, *Dy Clerk.*

Judgment and Decree.

Extract from the Minutes.

MONDAY, *December 19th*, 1881.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

NEW ORLEANS, SPANISH FORT & LAKE RAILROAD COMPANY
vs.
GEORGE DELAMORE.

On appeal from the fifth district court for the parish of Orleans.

It is ordered and decreed that the judgment appealed from be reversed, and proceeding to render such judgment as should have been rendered.

229 It is ordered, adjudged, and decreed, that the injunction herein issued be perpetuated as to the frame building known as the "pavilion," and that, in other respects, it be dissolved, and that plaintiff's demand be rejected, the costs of appeal to be paid equally by the appellants.

(Mr. Justice Tenner excuses himself, having been of counsel.)

Petition for Rehearing. Filed 31st Dec., 1881.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD CO.
versus
GEORGE DELAMORE. } No. 8035.

To the honorable the justices of the supreme court of the State of Louisiana:

The petition for rehearing herein of the New Orleans, Spanish Fort & Lake Railroad Company respectfully shows:

That there is error to the prejudice of petitioner in the opinion & decree herein, & especially in the following particulars.

1st. In holding that the right of way granted by the city of New Orleans to the first Canal Street, City Park and Lake Railroad Company was not transferred to its crediters & to Handy at the sale made by order of the United States district court, setting in bank-
230 ruptcy; that said right of reverted to the grantor; that Handy did not acquire it, did not remember, & did not transfer it to the second corporation, & that said corporation never owned it.

2d. In holding that the ordinance No. 4523, as of the city council of New Orleans, or its acceptance by the second company, negatives the theory that said corporation acquired the right of way adjudicated to Handy by the special master, that the right, if any, granted under said ordinance was never mortgaged, still less seized & sold, & that said grant was not superfluous.

3rd. In holding that the plaintiff is not the lawful owner of the franchise & right of way granted by the city of New Orleans to the first Canal St., City Park & Lake Railroad Company, & subse-

quently regranted, in the name of the second corporation, by said ordinance No. 4523.

4th. In holding that the mortgage given under the authority of the United States district court, sitting in bankruptcy, & by it accepted & approved in confirming the sale made under its orders, which mortgage was subsequently assumed by the second company, & under which the plaintiff acquired title, was but a valid mortgage upon the franchise, including the right of way of said first company.

231 5th. In expressing any opinion as to or passing upon the validity or reality or legality of the title of plaintiff as derived from the first company, through the sale made in the bankrupt court, & the subsequent sale under foreclosure of the mortgage given to secure the purchase price of the property so sold, the question as to that title not being at issue herein, or a decision as to its validity or invalidity not being necessary to a determination of the *issues* in this cause, which have reference solely to the franchises & rights of way granted or claimed to have been granted to the second company by the ordinance No. 4523, A. S., of the city council of New Orleans.

Wherefore petitioner prays that he be allowed a delay of *twenty* days to file printed argument in support of the foregoing grounds for rehearing herein, & that on due consideration a rehearing be granted, so far as respects the matters herein mentioned, & that petitioners have all general relief.

(Signed) CHAS. S. RICE,
" BREAUX & HALL,
" MOTT AND KELLY,
Of Counsel.

232 *Motion for Delay. Filed 19 January*, 1882.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY,
vs.
GEORGE DELAMORE. } No. 8035.

On motion of Chas. S. Rice, Breaux and Hall, and Mott & Kelley, of counsel, for plaintiff & appellants, & on suggesting that a further delay is necessary for the filing of argument in support of the petition for rehearing herein—

It is ordered by the court that a further delay of ten days be granted for said purpose.

Order Granting Delay.

Extracts from the Minutes.

THURSDAY, *January 19th*, 1880.

The court was duly opened.

Present: Their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

NEW ORLEANS, SPANISH FORT AND LAKE R. R. Co., vs. GEORGE DELAMORE. } No. 8035.

233 On motion of Charles S. Rice, Breaux and Hall, and Mott & Kelley, of counsel, on suggesting to the court that a further delay is necessary for the filing of argument in support of the petition for rehearing herein—

It is ordered by the court that a further delay of ten days be grant- for said purpose.

Brief on Application for a Rehearing. Filed February 1, 1882.

Supreme Court of Louisiana.

NEW ORLEANS, SPANISH FORT AND LAKE R. R. COMPANY vs. GEORGE DELAMORE. } No. 8035.

I.

George Delamore, a judgment creditor of the Canal Street, City Park and Lake Railroad Company, seized the right of way granted by the city of New Orleans to said company under ordinance 4523.

The ownership of this right of way is the sole matter in controversy.

234 The seizing creditor does even pretend that he has a right to and can or does seize any right of way or franchise than that granted by ordinance 4523. He questions the title to none other, nor does any one else contest the title to any other, so that no question does or can properly arise in this controversy as to the title to any other franchise.

It is true that the present plaintiff in setting up title to this franchise recites with circumstance title to an antecedent and similar franchise.

235 The plaintiff in this suit recites his title to the former right of way simply to give it standing in court, and to show that the rights of way under ordinance 4523 were given solely to confirm and by cumulation remove all question of former rights.

The provision in the second Canal Street, City Park and Lake Railroad Company was incorporated Jan'y 31st, 1878, wherein it is recited that "the value of the property and franchises of the late Canal Street, City Park and Lake Railroad Company, now belonging to the parties to this act, and which are to become the property of the corporation formed by this act," and the grant of parallel and similar franchises to the company in name, May 23rd, 1878, by ordinance 4523, seem to leave no doubt as to the interest of all parties, in accord with the above averment.

We respectfully submit, then, that the court went outside of the record when it decided that the bankrupt sale and the subsequent transfers were nullities; first, because the issue is raised and asked by no party to the suit.

Because it is unnecessary to a proper decision of the real issue in the case.

The position of the plaintiff herein is simply this:

236 It is in peaceable and unquestioned possession and enjoyment of certain rights of way conferred by ordinance 4523, of May, 1878.

The presumption of law is necessarily in favor of the legality of such unquestionable rights, for the court cannot and will not suppose the public authority derelict in its duty to prevent the illegal uses of valuable rights and franchises.

The court ought to presume that the proceedings had in the United States bankrupt court were regular; that when these proceedings showed that, under its orders, property, consisting of road-bed, rolling-stock, that a surrender of such right of way and franchises had been made, and that they were lawfully in the custody of the court. To presume otherwise is to presume, in the absence of evidence, that that court acted without evidence or legal authority, and to set aside its decrees without even the formality of an attack.

But there is sufficient evidence in the record that the franchise and right of way were lawfully in the custody of the bankrupt court. The petition addressed, according to the forms of the United [States] bankrupt act, to the district court in charge, shows that the

237 sale was applied for to satify, amongst others, certain mortgage creditors (Rec., p. —) Will your honors presume that these were not such mortgages as are sanctioned by the laws of the State? Will you not rather maintain the authority of that court and its decree (even if you might question it), not questioning that its orders were based upon proper foundations, both in law and fact?

Now, then, if the rights under ordinance 4523 are simply cumulative and confirmatory, it follows that they inseparably attach to and form part and parcel of the unquestioned rights of the company's possessions, and that the court must recognize them as such.

II.

Under section 692 the court concede that railroad companies may borrow money on their property and franchise to construct and repair their roads. In the case at bar the indebtedness was incurred for the purchase price of the road and franchises.

Here was a road incapacitated from meeting its obligations, insufficiently appointed, partially built only; it is sold at law, and the purchase price is represented in part by notes secured by mortgage; if not so sold it is doomed to evident and no distant annihilation. Its purchase under such circumstances and subsequent

238 successful operation by virtue of such sale is, if not in terms, at least and fairly in intendment, the construction of a road which by law could be secured by mortgage upon the franchises and all the property of the company.

It was to obtain payment of one of these very notes that the foreclosure and sale was made.

Act No. 13 of 1880 so enlarged section 692 of the Revised Statutes as to include the purchase of railroad, or the franchises and right of

way thereof, thus to the letter legalizing the purchase, even if the transaction be looked upon as the sale of a completed road.

III.

Concede that under the law the sale of a franchise cannot be made without the assent of the grantor; we say that the principle in its utmost extent does not touch the question at bar.

The rights granted and acquired under ordinance 4523 are not in any proper sense a franchise, which only emanates from the sovereign or with its consent.

The distinction between a franchise and a mere license or permit is clearly settled by the leading authority of Chicago City Railroad Company *vs.* The People *ex rel.*, 73 Ill., 548.

239 "The grant or license given by ordinance comes within no definition of a franchise; besides, a municipal body, it is understood, possesses no power to confer a franchise."

It is apparent, therefore, that the franchise of the company, and the right of way granted by the city ordinance are separate and distinct rights; the former derived from the sovereign, intransmissible without his consent, the other a simple license, a right of way, the subject of transfer and execution, unless prohibited by the grant itself; it results, therefore, that the original sale of this right of way, if it were involved in the case, is legal, and that the cumulative and confirmatory grant or license passed with it to the present owner.

Under this view the authorities cited have no application to the instant case.

The vice of the whole argment in opinion of the court, we humbly submit, consists in the assumption that the license to the plaintiff to construct its road on the streets designated in the ordinance is a franchise, the assumption being without authority. See Davis *vs.* Mayor, 4 Kernan, 506. It is but the authority granted by the city to the company to run its road through the designated streets,

240 as required by the statute of the State. It is the permit which the general statutes requires should be obtained of all cities through which it is proposed to run railroads, the object being to maintain what is known as the police power of cities, as contradistinguished from the right to grant a franchise, exclusively a sovereign right.

If the distinction is kept in view, there is no difficulty in maintaining, as we think the court should, that the permit under ordinance 4523 passed to the present plaintiff by sale, with the assent of the city, who, in any event, is the only party to complain, even if it had not.

We respectfully submit that the rehearing should be granted, and that the plaintiff's injunction should be made perpetual.

(Signed) BREAUX & HALL,
" CHAS. S. RICE,
Of Counsel for Plaintiff.

January, 1882.

Syllabus.

1. Plaintiff's title under bankruptcy proceedings is not drawn into controversy; its possession thereunder is not the question.

The court should not, therefore, have raised and passed upon the issue not presented or suggested by the pleadings.

241 2d. If it does, the presumption is that the bankrupt court rightfully disposed of the question of the transfer of franchises as under the law.

3rd. A company authorized by the sovereign to borrow money to build and repair its road, and hypothecate its road and franchises, may hypothecate them to pay for purchase price of a built road, which — but the equivalent act, This was done here, and it is to pay credit part of the purchase price that foreclosure was made.

Rev. statutes, 692; Act 13, 1880, p. 19.

4th. Ordinance 4523, and all similar ordinances, are only permits, not to be compounded with franchises.

If the grantee assigns them, the grantor, the city, is the only party that may complain.

Chicago City Railway Co., 73 Ill., 548. Davis *vs.* The Mayor, 4 Kernan, 506.

On Application for Rehearing. Filed January 26th, 1882.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD CO. *vs.* GEORGE DELAMORE. } No. 8035.

Brief of Mott and Kelly, of counsel for the New Orleans,
242 Spanish Fort and Lake Railroad Company in support of the application.

Syllabus.

1st. The doctrine that franchises held and owned by a corporation cannot be transferred or assigned, voluntarily or by sale under execution, without the consent of the grantor, should be limited in its application to particular franchises granted by special act of the State or sovereign to a particular corporate body, and has no proper application to rights of way acquired for valuable consideration or otherwise, not from the sovereign, but from individuals or municipal corporations. Such rights of way are not "franchises" in the sense of the doctrine referred to, which relates only to rights derived from special or particular grant from the sovereign, the reason of the doctrine as stated by the court in its opinion in this case, being, that it is a State prerogative to put the administration of its franchise into such hands as it may choose. This is no reason why rights of way acquired not by special grant from the State, but by gift or purchase from individuals or municipal corporations, should be transferable only with the special consent of the sovereign, which was not required for the acquisition of the right in the first instance.

243 Nor can the doctrine referred to have any proper application where the corporation is neither created nor its fran-

chises conferred upon it by any special act of the State entrusting the administration of certain specific franchises to a certain grant from the State, by the voluntary act of the corporators under general laws of the State equally applicable to all, and derives all of its franchises from such law. The reason of the doctrine manifestly has no relevancy to such a state of facts. *Cessante ratio, cessat et ipsa lex.*

II. Since the year 1845 it has been settled public policy of the State of Louisiana, as declared and defined by the constitution and laws, that corporations other than those for municipal or political purposes, should derive their corporate existence and franchises not from special grants from the State to particular corporate bodies, but from general laws equally applicable to all. Under the constitutions of 1845 and 1864 the Legislature was *expressly prohibited* from creating any corporation in the State except for municipal or political purposes by special laws, and it was made the duty of the Legislature to provide by general laws for the organization of all other corporations except corporations with banking or dis-
244 counting privileges, the creation of which was forbidden.

Since 1855, by general laws of the State, under all of its constitutions, it has been competent for any six or more persons to constitute themselves a body corporate for the purpose of constructing, maintaining, and operating railroads, etc., between any points within the State, with power to expropriate lands necessary for their purposes. The general laws of the State impose no restriction or limit upon the power and right of such voluntary corporations to build railroads anywhere within the limits of the State, except that the lands over which the road is to be constructed must be acquired by voluntary contract with the owners, or by the process of expropriation provided by the statute, and that "no railroad * * shall be constructed through the streets of any incorporated city or town without the consent of the municipal council thereof."

The franchises of such corporation, to be a body corporate and to construct, maintain, and operate a railroad, are no more derived from the consent of a municipal council to the construction of the road through certain streets than they are from the grants of rights of way by individual land owners. The franchises are de-
245 rived from the sovereign—the State—under its general laws.

When corporate capital has been expended upon the faith of the grant of rights of way from individuals or municipal corporations, such grants cannot be withdrawn without the consent of the grantee, still less can it be done when the grant was made for valuable consideration in the first instance, or upon onerous conditions that have been complied with.

Constitution of 1845, Art. 123.
Constitution of 1864, Art. 121.
Constitution of 1852, Art. 118.
Constitution of 1879, Arts. 247, 240, 243, 246.
Act No. 131 of 1855, p. 182.
Rev. Stat. of 1870, Secs. 683, 684, 685, 688, 689, 698, *et seq.*

III. The right to own, maintain, and operate a railroad, and to

take tolls thereon, are not necessarily corporate rights; they are capable of existing in, and being enjoyed by, natural persons, and there is nothing in their nature inconsistent with their being assignable. Such franchises are property, and nothing more. Like all other incorporeal rights, not expected by statute, they may, under the general laws of Louisiana, be sold. C. C., 2449.

246 Though not liable to be seized and sold under execution at law where the English common law and equity system prevails, unless by virtue of some statutory modification thereof, they may, under that system, be reached in equity or in bankruptcy, and subjected to the payment of corporate debts. In Louisiana, under the general execution laws of the State, all incorporeal rights not specially exempted by statute may be seized and sold under *fi. fa.* There is no statutory exemption of the incorporeal rights incident to operating a railroad for profit from liability to seizure and sale under execution.

Hall *vs.* The Sullivan Railroad Company, 21 Law. Rep., 138.
Adams *vs.* The Boston, Hartford and Erie Railroad Company, Bankr. R. (folio), p. 99.
Sweat *vs.* The Boston, Hartford and Erie Railroad Company, 5 Bankr. R., 243.
In re Southern Minnesota Railroad Company, 10 Bankr. R. 89.
Bank *vs.* Egerton, 30 Vermont, 182 (2 Redfield on R. R., 52, N. 4).
West River Bridge Co. *vs.* Dix, 6 How., 507.

IV. There is nothing in the law of the United States, or of the State of Louisiana, nor is there any sound consideration of public policy to warrant the assumption by a court of justice that a sale under

247 *under* the bankrupt laws of the United States, or under the general execution laws of the State of Louisiana, of a completed railroad and its accessories, constructed through the streets of a city, with the consent of the city council, by a corporation organized under the general laws of the State, effects a severance from the right of property in the completed railroad and its accessories of the *right to operate* and use them for the purposes for which they were constructed and designed, upon the like terms and conditions as were applicable to such right of employment and use of the property by the purchaser at such sale, so severed from the right of property reverts or is forfeited to the city or State; but that, on the contrary, the right to such employment and use subject to such conditions is inherent in the right of property in the railroad, and passes with it to the purchaser.

In re So. Minn. R. R. Co., 10 B. R., 89.
Adams *vs.* R. R. Co., 4 B. R., 99.
Sweat *vs.* R. R. Co., 5 B. R., 243.
R. R. Co. *vs.* James, 6 Wall., 750.
U. S. *vs.* Morgan, 93 U. S., 217.
Cor. Drant Co. *vs.* Stuphers, 21 How., 112.
Gue *vs.* Canal, 24 How., 262.
Chaffe *vs.* Ludeling, 27 A., 610.

248 V. A judicial sale made by a court of competent jurisdiction of property specifically described in the decree ordering the sale upon terms fixed by the decree, the sale having been reported to and confirmed by the court ordering it to be made, is final and conclusive, not only against the parties to the proceeding and their privies, but against all the world, and can be attacked only in a direct proceeding for the purpose before the court ordering and confirming the sale upon the averment of fraud participated in by the purchaser.

The title derived from such a sale cannot be attacked before any other court, or be collaterally called in question then, and no other court has any warrant or authority to pronounce such title a nullity.

Stooktor *vs.* Douncy, 6 A., 585.
Brosnahan *vs.* Turner, 16 L., 440.
Succession of Kaiser, 22 A., 175.
Rover on Judicial Sales, Secs. 1, 2, *et seq.*
Voorhees *vs.* Bank, 10 Peters, 450.
Gray *vs.* Brignardello, 1 Wallace, 634.
Florentine *vs.* Barton, 2 Wallace, 246.
Greegnon's Lessee *vs.* Astor, 2 How., 338.
Peck *vs.* Jamess, 7 Howard, 624.
Bledsoe *vs.* Erwin, 33 A., 620.

249 *Statement and Argument.*

The New Orleans, Spanish Fort and Lake Railroad Company, averring that all the rights of way, powers, and privileges described in the city ordinance No. 4523 had been previously granted, under certain prior ordinances, to another company, and that the Spanish Fort Company was the owner of all the rights of way, privileges, etc., so granted by said prior ordinances, by title thereto derived under a sale made of them in the bankruptcy of the company to which they were originally granted, and by mesne conveyances, and averring that the grant of identically or substantially the same rights of way and privileges to another company by ordinance 4523 was in conflict with their prior title, and calculated to throw a cloud upon it, applied for and obtained an injunction restraining Delamore from advertising and offering them for sale under his execution. Delamore, seeking himself to subject to sale, under execution, alleged corporate rights and franchises of the identical character of those to which title is claimed by plaintiff in injunction, could not, of course, contest the validity of that title upon the ground that such rights and franchises were of a character to exempt them from being taken in execution and sold for corporate debts.

250 The court, while emphatically declaring, in its opinion, that such franchises could not be seized and sold under execution, dissolved the injunction restraining Delamore from proceeding to sell them.

As far as plaintiff in injunction is concerned, the matters which were at issue between the parties to this litigation have sunk into insignificance before the gravity which the case has been made to

assume by certain enunciations of doctrine by the court affecting a rule of property of a kind in which large amounts of capital have recently been invested in this State, upon the faith of sufficiency of certain titles to own and operate railroads in the State—titles which, we believe, had been pronounced secure by every member of the bar. Mr. Justice Fenner, recused in this case, — of the number —— whose opinion has been taken by capitalists before investing their money upon the faith of such titles.

In view of the great importance not only to the plaintiff in this cause, but to others, of the question dealt with in the opinion, and in the hope that, upon reconsideration, the court will place
251 the titles to railroad franchises in Louisiana upon as secure a foundation as titles to other species of property, we earnestly ask the attention of your honors to the reasons which, in our judgment, should induce you to order a rehearing of the cause.

The court say, that, as to the franchises and right of way, the question presented was, "Whether the franchise or right of way granted by the city to the first company passed to Handy, and whether they next were transferred by him to the second company, and whether they, or these conferred by ordinance 4523, afterwards passed from it, under executory proceedings, to Schwartz & Brother, and whether they were finally transferred by the latter to the present plaintiff."

This statement is accurate, except in one particular. There is no claim on the part of the plaintiff to be the transferee or assignee of any right or franchise under ordinance 4523; the claim is to substantially the same rights and franchises under *prior* ordinances, which had been sold to Handy at bankrupt sale, and by him transferred to the second company, that company assuming, in part consideration of the transfer, the payment of the balance of the price due therefor to Handy.

252 The petition specifically avers, Rec., p. 3, "that none of said property is the property of said Canal Street, City Park and Lake Railroad Company; that all the rights of way, powers, privileges, immunities, and franchises described in said ordinance No. 4523 *had long before the date of said ordinance been granted to and conferred on another corporation* of the same name by the council of the city of New Orleans, by certain ordinances which are specified, and the title relied on by plaintiff is as transferee and assignee by mesne conveyances from said first company of the rights granted by said prior ordinances.

In reference to the sales and transfers relied upon by the plaintiff, the court say: The right of way granted by the city to the first company was not bankruptcy sale. It had reverted to the grantor. Handy, therefore, did not acquire, did not encumber, and did not transfer it to the second corporation, which, therefore, never owned it. * * * The city authorities granted the second corporation a similar right of way, which was accepted by it.

This acceptance negatives the theory that this corporation ac-
253 *quired the right of way adjudicated to Handy* at the sale of the assets by the special master.

The court had already stated in the proceeding portion of the

opinion that the grant by ordinance 4523 was made on the 22d of May, 1878, and that the transfer from Handy of the rights acquired by him was made afterwards, to wit, on the 15th day of August, 1878. It would therefore seem more logical to say that the purchase by the second company in August, 1878, of the franchise bought at the bankrupt sale by Handy, and their assumption to pay the credit portions still due for the price of the bankrupt sale, negatives the theory that this corporation had already acquired the same rights and franchises by ordinance 4523, passed in May previous; but it is too obvious to require argument to enforce it that if the creditors of Handy, holding his notes for the credit portion of the price of the property sold to him at the bankrupt sale, *had any rights at all*, no action of Handy, or of the *second* company, who likewise became debtors of the holders of the notes by assuming their payment, could *take away or abridge the rights* of the creditors
254 without their consent. If the creditors ever had the right to have the property seized and sold to satisfy their debts, that right manifestly could not have been in the least impaired by what their debtors and the city of New Orleans did.

"This right of way," say the court, "granted by the city to the second company, by ordinance 4523, was never mortgaged by it at all, still less seized and sold." As has been shown, the plaintiff never pretended that it was.

Plaintiff's claim is not under it, but over and *above* it by *prior* grant.

"The plaintiff claims that the grant was superfluity; but this — not so. As the first right of way was not surrendered, was not sold, was not transferred to the second company, it was not sold to Schwartz and Brother, who did not therefore acquire, and did not sell it to the plaintiff. * * * It is settled by numerous authorities that the franchises and corporate rights of a company, and the means vested in them which are necessary for the existence and maintainance of the object for which they were created, are incapable of being granted away and transferred by any act of the company, or by any adverse proceeding, unless with the consent
255 of the donor or grantor *formally expressed*. In the absence of any provision to that effect, either in the general law or in the charter, it is also settled that the franchise cannot be levied on for debt.

When the sovereign covenants and agrees that *a certain corporation* shall administer *certain franchises*, its ordinary judgment creditors may sell its property, but not its franchises. They are beyond the reach of an ordinary execution. It is a State prerogative to put the administration of its franchises unto such hands as it may choose. These franchises cannot be transferred to other hands without the consent of the grantor."

Whether or not the franchise *to be a certain corporation or body politic* can be transferred or assigned voluntarily, or by sale under execution, is a question, the solution of which either way is unimportant to this discussion, as the plaintiff company does not claim to have acquired any such franchise by transfer or assignment, but claims to be a body corporate, organized under the general laws of the State providing for the organization of corporations for works

of public improvement. The right which the plaintiff com-
256 pany does claim to have acquired under the sale in bankruptcy and mesne conveyance from the first Canal Street, City Park and Lake Railroad Company is the right to operate and use the railroad and its appurtenances, which the court concedes the plaintiff company has so acquired, for the purposes of which the railroad and appurtenances were constructed and designed upon the same terms and conditions and subject to the same liabilities and duties to the public, the city, and the State, as were applicable to the first Canal Street, City Park and Lake Railroad Company.

We deny that where a corporation has been organized under the general laws of the State, for the purpose of building, maintaining, and operating a railroad, has obtained a right of way for the road in a lawful manner, and has constructed, equipped, and operated the road in conformity to law, and has incurred debts, that it is to the interest of such corporation, or of its stockholders, or of its creditors, or of the public, or of the city, or of the State that a sale of the property of the debtor corporation under execution, should in all
257 cases, except where the sale is made in the enforcement of the one species of mortgage mentioned in the opinion of the court, have the effect to sever from the property the right to use it for the purpose for which it was constructed and designated, the right of so using it constituting the main element of its value, thereby reducing the railroad and its accessories to the value of the mere material of construction, or of so much old junk.

We deny, emphatically, upon principle and authority, that at the time of the surrender in bankruptcy of the assets of the first company, and the sale thereof by the special master, or at any time subsequently, there was or has been anything in the laws of the United States or of the State of Louisiana, or any sound consideration of public policy, which required or warranted a severance from the right of property in the railroad and its accessories of the right to operate and use them for the same terms and conditions as attached to the right of ownership in the hands of the first company.

Further, we say that all the right of way, privileges, and franchises of the first company, as they existed at the time of the sur-
258 render in bankruptcy, were, by the district court of the United States for the district of Louisiana, sitting in bankruptcy, a court of competent jurisdiction in the premises, ordered to be sold by a special master of that court; that in obedience to said order, they were sold by said master to Thos. H. Handy; that this sale was reported to the court, and a decree entered confirming it, and ordering a conveyance thereof to be made by notarial act by the master to Handy; which was done accordingly. We say that the district court of the United States was itself the vendor of the franchises and rights in question to Handy, and that such title, by judicial sale of specific property, in obedience to a decree of a court of competent jurisdiction, is binding, not only on all the parties to the proceeding, but upon all the world, and can only be attacked before the court which ordered and confirmed the sale, and can only be attacked there upon averment of fraud, to which the purchaser was

privy, and that the correctness of the proceedings of that court, and the validity of the title passed by it to the property, cannot be attacked or collaterally called in question in any other court.

259 Much less has any other court the right to pronounce the nullity of the proceedings of such court of competent jurisdiction, and of the title acquired from and confirmed by it, as this court has done in this case.

The right of the sovereign—the State—to determine to whom the administration of its franchises shall be entrusted, and to provide that the administration of them shall not be transferred without the consent of the grantor to others than those originally selected by the State, of course is not questioned. Where special franchises have been granted to particular corporations by special enactment, that is, when there has been a special selection or designation of the grantors of the franchises by the State or sovereign, as was formerly very generally the case, then the authorities referred to by the court, to the effect that such franchises are not transferable or assignable except with the consent of the grantor are relevant, and there is an intelligible though somewhat artificial reason for the rule. But we submit that these authorities have no relevancy whatever when sought to be applied to cases where there *has been no special*

260 *selection or designation of grantees of the franchise*, but the franchise may be exercised by all who will comply with the requirements of a general law of the State. Why should a special consent of the grantor be required to the transfer of a franchise to the original acquisition and exercise of which no special grant or act of the State was requisite?

The policy of the State of Louisiana, as declared and defined by its constitution and laws from 1845 to this day, has been at all times not to require any special act or consent of the State to the creation of corporations other than those of a municipal or political character, or to the acquisition of such franchises as are connected with the constructing, owning, maintaining and operating works of public improvements, such as railroads. It is so unreasonable to contend that a right or franchise, which may be originally acquired and exercised without any special act or consent of the State, cannot be transferred without such special consent that we shall waste no words in endeavoring to demonstrate the absurdity of it.

261 By the constitution of the State of Louisiana of 185–, Art. 123, it was declared that "corporations *shall not be created by special laws*, except for political or municipal purposes; but the Legislature shall provide *by general laws* for the organization of all other corporations, except corporations with banking or discounting privileges, the creation of which is prohibited."

Art. 121 of the constitution of 1864 is to the same effect.

Since the year 1855 it has been the policy of the State of Lousiana at all times to allow voluntary associations of persons, not less than six in number, to constitute themselves a body corporate without any special grant from the State, with the right to construct, own, maintain, and operate railroads between any points in the State, with power to acquire lands necessary by purchase or expropriation,

with no limit whatever upon the location of the road other than that the lands over which it is to be constructed must be acquired by the company, and that no railroad shall be constructed through the streets of any incorporated town or city without the consent of the council thereof.

When such consent is granted it is obvious that the fran-
262 chise to maintain and operate a railroad is no more derived from the grant of the right of way by the city than it is derived from the acquisition of the right of way elsewhere; but that the franchise is acquired from the State under the general laws providing for the organization of corporations for works of public improvements; that there can be no question of any forfeiture or reversion to a town or city of such franchise, and that where corporate capital has been expended in the construction of a railroad through the streets of a city upon the faith of the consent of the city thereto; the mere transfer or assignment of the road and its appurtenances would not authorize the withdrawal of the consent of the city after the corporate capital had been expended in the construction of the road.

Citation of authority is hardly needed in support of propositions so plain. We refer, how-er, to C. C. R. R. Co. *vs.* The People, 73 Illinois, 548, where it was said that it was a misconception of the law that a railway company derives its power to construct a railroad from any ordinance of the city, that all of its authority is from State and conferred by its charter.

263 Acts of 1855, No. 131, p. 182.
Rev. St. of 1870, Secs. 683, 684, 689, 698, *et seq.*

After the surrender in bankruptcy of the first New Orleans, City Park and Lake Railroad Company a petition was filed by J. A. Shakspeare, the assignee, which will be found at page 64 of the transcript in this case, in which among the assets surrendered and belong to the estate in bankruptcy were "the railroad track and all, singular, built in pursuance of the charter of said company, and the various grants or privileges conferred on said company by the city of New Orleans, etc., and that the said property was encumbered by certain specified mortgages, judgments, liens, and privileges," which are enumerated, among them, a mortgage in favor of the New Albany Railmill Company for $19,772.76, a mortgage in favor of Wm. Henry for $35,000, and a number of other mortgages and liens in favor of material, men, mechanics, and others. The petitioner represented that it was impossible for him to determine the validity of the encumbrances and the amounts due thereon by agreement between himself and the creditors, secured by said liens and mortgages, and he prayed to be allowed to sell the property clear of encumbrances, reserving the rights of the creditors upon the proceeds.

264 On this petition the property was ordered to be sold by the court by a special master; was sold in obedience to said order, the sale reported to the court, and by it confirmed, and an authentic act of sale passed by direction of the court by the special master to

the purchaser, the rights and franchises of the company being specifically referred to at every stage of the proceedings, and expressly included in the act of sale.

In thus administering upon the assets of the bankrupt company, including the rights and franchises incident to the ownership, maintenance, and operation of the railroad, the United States district court for this district was fully warranted by precedent and authority.

In re Southern Minnesota Railroad Company, 10 B. R., 89, Nelson, J., said: * * While it may be conceded that the naked franchise to build a railroad or railroad bridge cannot be reached by an execution issued upon a judgment obtained in an action at law, it by no means follows that when the right to tranfer such franchise has been granted by the Legislature, it is impossible for a court to compel its subjection to the just demands of the creditors when an appeal is made to its equitable powers.

265 "But inasmuch as the corporation is subject to all provisions of the bankrupt act, it is certainly possible for the district court or the register to make *a transfer of all its property, including its franchises*, and administer its assets in the same manner as is provided in respect of natural persons."

The question of the power of the United States courts sitting in bankruptcy to deal with the franchises of a bankrupt railroad corporation, is thoroughly and exhaustively discussed in the two following cases, to which the attention of your honors is earnestly invited: Adams *vs.* Boston, Hartford and Erie Railroad Company, 4 Bankr. R. (folio) p. 99, U. S. District Court of the district of Massachusetts. Shepley, J. This is a motion to dismiss the petition in this case, upon the ground that railroad corporations are not included within the provisions of the 37th section of the bankruptcy act, and, that therefore this court has no jurisdiction in bankruptcy to entertain this proposition.

The first ground of objection is that a railroad corporation is a public corporation, created for a public purpose, and bound to the State for the performance of a public duty. * *

266 It is further contended, however, that the Legislature of Massachusetts, in creating this corporation, has subjected it to certain duties and liabilities; *that the liabilities are not transmissible; that these* duties cannot *be delegated; that the corporation cannot divest itself of the power it has of performing these duties; "that it is a Massachusetts corporation, a creature of the laws of Massachusetts*, placed under the supervision of the authorities and courts of Massachusetts, and *liable to perform certain duties, which, by the laws of Massachusetts, cannot be performed by any person to whom its property may be transferred or its franchises delegated.*"

The force of the argument, which seems to apply solely to Massachusetts corporations, and to claim the application to Massachusetts railroad corporations of a special exemption from the operation of the bankrupt act, independent of and distinct from any rule which may apply to railway corporations existing under the laws of our State, is somewhat impaired by the fact that the duties of the corpo-

ration have been delegated, and are now delegated, by the action of the supreme court of Massachusetts, to a board of receivers; that by the action of the same distinguished tribunal this
267 corporation has been, and now is, in fact, divested of the power of performing its public duties, and that it is not now, by reason of the action of the highest judicial tribunal in the commonwealth, in the possession or exercise of its franchises, so far as these franchises confer upon it the power to build, operate, and control the railroad. And we look in vain into the legislation of Massachusetts for any indication of public policy *to exclude the property of railroad corporations or such of their franchises as are in their nature assignable and transferable from the liability to be taken by due process of law and applied to the payment of corporate debts.*

East Boston Freight Railroad Company *vs.* Hubbard *et als.*, 10 Allen, 459, note, is a case where the Grand Junction Railroad and Depot Company became insolvent, and Geo. W. Gordon, a creditor, recovered judgment, and the sheriff levied his execution *upon their franchises*, and sold the same, with all the rights and privileges, so far as relates to receiving of tolls, for the term of ninety-nine years. The title of the purchaser at the sheriff's sale was upheld by the court.

268 A corporation created for the purpose of constructing, owning, and managing a railroad cannot, it is true, make any alienation of its general franchise to be corporation, or its subordinate franchises to manage and carry on its corporate business, without distinct legislative authority. Such is the law in England.

French *vs.* Brokerherd, 13 E. L. and E., 506.

And in Massachusetts—

Hoxie *vs.* Pinkerton, 14 Allen, 385.
Richardson *vs.* Sibley, 11 Allen, 65.
Commonwealth *vs.* Smith, 10 Allen, 455.

This distinct legislative authority for the alienation of the assignable and transmissible franchises of railroad companies to carry on their business of managing a railroad and taking tolls, has been freely accorded in Massachusetts, and the public policy of the commonwealth, embodied in its Legislature, *allows a creditor to sell these franchises in execution, and permits the corporation themselves, within prescribed limits, to alienate them for the payment of debts or for the security of creditors.* * * *

But it is not believed that the question whether railroad corporations are subject to be dealt with under the provisions of the bankrupt act, is one which is dependent upon the special provis-
269 ions of the statutes of the several States regulating the *transfer of the corporate property or franchises, or applying them to the payment of the corporate debt.*

The grant of constitutional power to Congress to establish uniform laws on the subject of bankrupteies throughout the United States is general in its terms and unlimited. It was not doubted at the argument of this motion that it applied as well to corporations as natural persons. The only question which can arise is whether Congress

has, by appropriate legislation, in the exercise of its powers conferred by the Constitution, rendered railroad corporations subject to the provisions of the act. As the system of bankruptcy is to be *uniform* throughout the United States, the solution of this question must depend upon the construction of the terms of the act itself, and not upon the particular legislation of the several States. * * *.

We have already seen that the public policy of the State in which this corporation exists allows alienation of the franchises and property of railroad corparations for the payment of their debts. The inconvenience attending such alienation is obvious. But as the argument *ab inconvenienti* has not been sufficiently strong to
270 prevent these franchises from being sold and the proceeds of the sale applied in payment of debts of the first attaching creditors, it certainly does not apply with greater force to a statute providing for the more equitable division of the proceeds among all the creditors.

The franchise which authorizes a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, is not alienable or transferable without direct and positive legislative authority. This is the franchise to be a corporation. It is the life of a corporation.' Coupled with the grant of this franchise of corporate existence are the grant to the corporation of the franchises to carry on the corporate business, which are grants of valuable privileges, and which, in the case of most private corporations, may be transmitted (as the history of this corporation shows they have been transmitted repeatedly) *from one corporation to another, or to individuals*, without great detriment to any public objects for which they were created.

This distinction between the powers of a corporation, which are *inalienable* without a *positive provision of law, and these possessing nothing inconsistent with their being transferred or assigned*, has
271 never been more clearly defined than in the opinion of Mr. Justice Curtis in the case of Hall *vs.* The Sullivan Railroad Co., 21 Law Rep., 138.

"The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes by which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing and being enjoyed by natural persons, *and there is nothing in their nature inconsistent with their being assignable.*"

The grantee of the franchises of a corporation to operate a railroad can acquire no greater rights than the corporation itself has by the term of the charter. *The purchaser must take his title, subject to the condition of the original grant, and subject to all duties and liabilities to the State, to the public, and individuals, none of whose rights can be impaired by the transfer.*

It does not appear to us that there are any such inherent difficulties in the way of the sale and transfer of the property and franchises of a railroad subject to these conditions and limitations as

272 will require us to give such a construction to the statute as would exclude the corporation from the operation of that clause of the bankrupt act, a liberal construction of which clearly renders them liable to be dealt with under its provisions.

In Sweat *vs.* Boston, Hartford, and Erie Railroad Company, V Bank, R., 243, the foregoing opinion was affirmed by Mr. Justice Clifford: * * "In all these cases the uses may, in a certain sense, be in the public, but the *corporations are private, as much so, indeed, as if the franchises were vested in a single person.* * But suppose that the franchise to be corporation, unless assignable by the laws of the State, is not transmissible under the bankrupt act, *still it is unquestionably* true, as was held by the district court in this case, *that the franchise to build and manage a railroad, and all the property of the company, are alienable and subject to sale and transfer* under the laws of the State which created the corporation. * * Much discussion of this point, however, is unnecessary, as the court here *concurs entirely with the* views *expressed by circuit judge* in disposing of the case in the district court. Adams *vs.* Railroad Company, 4 B. R., 99."

273 We are aware of the existence of no authorities adverse to those just quoted with regard to the power of the federal courts sitting in bankruptcy to deal with the franchises of bankrupt railroad companies. The Federal courts have also dealt in the same manner with the franchises of railroad companies in *in* the exercise of their jurisdiction as courts of equity. In Wisconsin, as in Louisiana, a money judgment of an ordinary creditor duly recorded in the proper office becomes a lien on the real estate of the judgment debtor, and in the case to which we will next refer the Supreme Court of the United States held that a sale made under a decree of the circuit court to satisfy such a lien upon the property of a railroad company passed *the whole interest of the company* as it existed at the time of the rendition of the judgment.

In Railroad Company *vs.* James, 6 Wallace, 750, Cleveland received a money judgment against the La Crosse and Milwaukee Railroad Company and assigned his judgment to James. Subsequently to the entry of this judgment the company mortgaged its road, and under this mortgage the eastern division of the road was sold, the western division having been sold under liens prior to

274 both Cleveland's judgment and the mortgage. The purchasers of the eastern division, under foreclosure of mortgage, organized a new company under the name of the Milwaukee and Minnesota Company, and took possession of the road.

James then filed his bill in the circuit court against the latter company for the purpose of having his judgment declared a lien on the eastern division of the road, and of having the same sold to satisfy the judgment.

The court decreed that the judgment was a lien from the time of its rendition; that the La Crosse Company had ceased to exist as a corporation, and that the Milwaukee and Minnesota Company had succeeded to its rights as to the eastern division, subject to all prior liens, and directed a sale of that division by the marshall, which was made, reported to the court, and confirmed.

Three appeals were taken—one on a petition of the stockholders in the Minnesota Company, asking that the decree be vacated, and they be let in to defend; one on the petition of the Minnesota Company to stay sale and open and vacate decree, which was denied;
275 and one on appeal by the same company from the order confirming the sale.

The Supreme Court of the United States, through Mr. Justice Nelson, as the organ of the Court, disposed of all of the appeals summarily, in an opinion of sixteen lines. "The La Crosse and Milwaukee Company, by virtue of its charter and the proceedings under it, acquired a title in fee to the road-bed; and the rolling stock owned by it and used and employed in connection with the road, is made a fixture by an express statute of the State of Wisconsin, and such, we think, is the law according to the true construction of the charter, independent of the statute. By the statute law of Wisconsin judgments are liens on real estate, and we do not doubt but that this judgment became a lien on the road from the time of its rendition, and *that a sale under a decree in chancery, and conveyance in pursuance thereof, confirmed by the court, passed the whole interest of the company existing at the time of its rendition to the purchaser.*

"A great many objections have been taken to the decrees below, but those of any substance or force will be found answered by the principles above stated. *Decrees affirmed.*"

276 In State *vs.* Morgan, 28 A., 484, it was held by a divided court that a sale under ordinary writs of *fieri facies* against the New Orleans, Opelousas and Great Western Railroad Company, of the property of the company, on a line of railroad running from Brashear city northwestwardly, etc., the franchises of the road did not pass to the purchaser, for the reason "that when the State covenants and agrees that a *certain corporation* shall administer certain *franchises*, the ordinary creditors of that corporation may seize and sell its property, but not its franchises. It is a State prerogative to put the administration of its franchises into such hands as it may choose, and they cannot be transferred to other hands without the consent of the State." And the court then goes on to refer to the special statute of 1852, by which the State granted the franchises in question to the New Orleans, Opelousas and Great Western Railroad Company a grant of certain franchises to a certain company. The reasoning can have no application to franchises not acquired by any special grant from the State, but which could have been acquired by any self-constructed corporation under the general
277 laws of the State, there being an entire absence of anything in the nature of special choice or consent on the part of the State.

Mr. Justice Howell concurred merely in the conclusion and decree, which was that a certain immunity from taxation by the State granted to the corporation by its charter did not pass to the purchaser at the marshal's or sheriff's sale, which conclusion and decree we believe to be correct, as it was held to be an appeal by the Supreme Court of the United States.

Ludeling, C. J., dissented, and, although we do not concur in his

views in so far as the question of immunity from taxation is concerned, we think his reasoning that the franchises are incorporeal hereditaments as well known as any estate in land, and that by the texual provisions of the code, not only corporeal objects may be sold, "but also incorporeal things, such as a debt, an inheritance, a servitude, or any other rights. C. C. 2449," as applied to such purchases as are in question in this suit, is sound and conclusive. And such was the view taken of the matter by the Supreme Court of the United States in Morgan *vs.* Louisiana, 93 U. S., 217.

278 Mr. Justice Field, delivering the opinion of the Court, said: * * "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and indefinite meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the *of the* company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. *They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked.* Immunity from taxation is not one of them. *The former may be conveyed to the purchaser as part of the property of the company;* the latter is personal, and incapable of transfer without *express statutory* direction."

279 In West River Bridge Company *vs.* Dix, 6 Howard, 507, Mr. Justice Daniel, delivering the opinion of the court said: * * "*We are aware of nothing peculiar to a franchise which can class it higher or render it more secured than other property. A franchise is property and nothing more.*" And Mr. Justice Woodbury, in his concurring opinion, at p. 541, said: * * I concur in the opinion that a corporation to build a bridge like that of the plaintiff's in error is itself in one sense a franchise, * * and in another sense that it possesses franchises incident to its existence and objects, such as powers to erect the bridge and take tolls. * * I concur in the views also that such a franchise as the incorporation is a species of property. * * It is a legal estate vested in the corporation. But it is often property distinct and independent of the other in land, timber, goods, or choses in action, which a corporation, like a body not artificial, may own. * * It is also property subject to be sold, sometimes even on execution (Semb., 4 Mass.; 11 Peters, 434), and may be devised or inherited. 17 Conn., 60."

280 In Covington Drawbridge Company *vs.* Shepherd and another, 21 How., 112, the franchise of the corporation to levy tolls upon their bridge over the Wabash river, a navigable stream, was subjected by process in equity to the satisfaction of judgments obtained against it at law in actions of *tort*. By the laws of Indiana lands and tenements could not be sold under execution

until the rents and profits thereof for a term not exceeding seven years shall have first been offered for sale; but if that term or a less one would not satisfy the execution, then the debtor's estate in the land might be sold. Upon the theory that the tolls were the rents and profits of the bridge, they were sold by one of the judgment creditors for one year, according to the forms of this law; but, the court considering that the bridge in that case was a mere easement, the corporation not owning the fee in the land at either bank of the river or under the water, found it difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. * * "One thing, however, is plainly manifest," said the court, "that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how
281 they can obtain satisfaction of their judgments from this corporation, owning no corporate property but this bridge, unless equity can afford relief."

And the court held that equity could afford relief by the appointment of a receiver to take possession of the property and the control of the franchises out of the hands of the corporation to which it had been entrusted by special statutory enactment, and thus, by what has been often termed an equitable execution (Story Eq. Jur., sec. 829), subject the franchise of the corporation to levy tolls upon a bridge across a navigable river to the satisfaction of judgment at law against it for torts.

Under the forms of procedure in chancery a natural person or corporation, over whom a receiver is appointed, is required to convey and assign to the receiver all property, credits, rights, or franchises of whatever character to which the receivership applies, and in cases of insolvency, or where the rents and revenues of the estate thus subjected to equitable execution are inadequate to satify the claims of creditors, the receiver will be directed to sell the whole, or sufficient portion of the estate so assigned and coveyed to
282 him to satisfy the claims of complainant creditors, all sales made by him for this purpose being required to be reported to the court for confirmation or disapproval. The order of confirmation is a decree of the court from which an appeal will lie as in the case of James *vs.* Railroad Company, already referred to, and if unreversed, is binding not only upon parties but upon all the world, until set aside by a direct proceeding for the purpose before the court which rendered the decree.

The practice of appointing receivers over corporations to subject their property and franchises to the payment of their debts, at the suit of creditors of every class, is of constant occurrence in all courts of appropriate jurisdiction throughout the land.

The propriety, upon sufficient cause shown, of courts thus dispossessing corporations of the possession and administration of their property, and the exercise and control of their franchises, and transferring them to others, cannot well be questioned now by any member of the profession claiming to be conversant with the general jurisprudence of modern times. And yet we are told that the property right of an indebted corporation in a valuable franchise

can not be subjected to sale under execution, because none
283 other than the original grantees can, except by statutory sanction, be permitted to acquire, control, and exercise a franchise granted to a corporation; that a vigilant and enterprising judgment creditor may seize and sell all or any part of the material structure of a railroad company, all its rails, and cars, and locomotives, for what they will bring, severed from the franchise, under which alone they can be profitably used for the purposes for which they were constructed; that the value of the franchise itself may, by such severance, be depreciated and destroyed, but that it is *contrary to public policy* to allow the material constructions, and the right to use them for the purpose for which they were adapted and designed, *with* right of use constitutes the main element of their value, to be sold together for the benefit of all the creditors of the coporation, according to their rank and priority, and of the stockholders and corporators, where the proceeds of the sale are more than sufficient to pay the debts of the corporation. It is manifest that the right to operate a railroad without a road to operate, and a railroad
284 without a right to operate it, are like of little value. And yet, by a distinction so nice as to be difficult of perception to any eye not abnormally microscopic, it is said, that for some inscrutable reason of public policy, while you may sell a railroad under execution, by so doing you necessarily sever from the right of property in the road the right to use it for the only purpose to which it is adapted, without which right the naked property in the road is of comparatively little value.

We submit that the distinction here is too fine for the wisdom of it to be intelligible to railroad men or capitalists, or to the great body of those whose lives are devoted to the study, profession, and practice of law.

Ninria subtilitas in jure reprobatur, et talis certitude certitudenim confenedit. This court has repeatedly recognized the validity of the transfer of *corporate franchises* from corporations to individuals. In Chaffe *vs.* Ludeling, 27 A., 607, and State *vs.* Morgan, 28 A., 484, there was an absolute transfer by sale under execution of corporate franchises to natural persons, and the franchises so transferred had been conferred on particular corporations by specific statutory
285 enactment. In Rabassa *vs.* Orleans Navigation Company, 5 L., 461, the voluntary transfer of a corporate franchise, specially conferred by statute on a particular corporation, to individuals, by lease and sublease, was recognized by the court as a valid transfer.

So in Boykin *vs.* Shaffer, 13 A., 129, the transfer by the corporation of a similar franchise to an individual for a term of years was recognized and enforced as a valid contract, although it was specially contended in argument that the corporation did not and could not make such transfer of its corporate franchise.

So, in Gubernator *vs.* City of New Orleans, 20 A., 106, where the Carondelet Canal and Navigation Company, a corporation created by special act, transferred all of the franchises conferred upon it by its charter to an individual for a term of years by lease, it was contended that the corporation "had no authority in law to lease or

until the rents and profits thereof for a term not exceeding seven years shall have first been offered for sale; but if that term or a less one would not satisfy the execution, then the debtor's estate in the land might be sold. Upon the theory that the tolls were the rents and profits of the bridge, they were sold by one of the judgment creditors for one year, according to the forms of this law; but, the court considering that the bridge in that case was a mere easement, the corporation not owning the fee in the land at either bank of the river or under the water, found it difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. * * "One thing, however, is plainly manifest," said the court, "that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how
281 they can obtain satisfaction of their judgments from this corporation, owning no corporate property but this bridge, unless equity can afford relief."

And the court held that equity could afford relief by the appointment of a receiver to take possession of the property and the control of the franchises out of the hands of the corporation to which it had been entrusted by special statutory enactment, and thus, by what has been often termed an equitable execution (Story Eq. Jur., sec. 829), subject the franchise of the corporation to levy tolls upon a bridge across a navigable river to the satisfaction of judgment at law against it for torts.

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otherwise dispose of its entire corporate property and rights, and to subrogate to all its corporate powers and privileges the plaintiff or other persons," yet the court recognized and enforced the contract as valid.

In Bowman *vs.* Walthen, 2 McLean, 393, Mr. Justice McLean said:

286 "It is insisted that a license to keep a ferry is personal, and cannot be assigned; that as the right of the defendant Walthen rests upon transfers from the original grantees, and has no other foundation, it must be held invalid. In this respect no difference is perceived between a ferry franchise, the franchise of toll-bridge, a turnpike, or railroad, or any other franchise of the State, and the grantee becomes bound to afford the proposed public accommodation. It is true the grant is made in the one case to a private individual, and in the others to corporations; but, as regards any matters of public confidence, it would seem to apply as strongly to the individuals incorporated as to the grantee of a ferry. * * The public can have claim on the grantee beyond the requirements of the law; and it is immaterial whether these are fulfilled by the grantee or his assignee.

When an office is conferred which implies confidence and a capacity to discharge public duties, no assignment could be made of it; but this has no analogy to the assignment in question. In National Bank *vs.* Raymond, 29 A., 358, this court held that the franchise or right of collecting market dues could not be

287 severed by the sale of it under execution from ——. The impolicy and injustice of allowing a severance of the property from the franchise of a corporation owning and operating a work of public improvement appears to have been fully appreciated by the Supreme Court of the United States in the case to which we shall next refer.

In Gue *vs.* Tide-Water Canal Company, 24 How., 262, Taney, C. J., delivering the opinion of the court, said:

"The tide-water canal is a public improvement, situated in the State of Maryland, and constructed and owned by a joint stock company, chartered by the State of Maryland for that purpose. The canal extends [from] Havre-de-Grace, in Maryland, to the Pennsylvania line; and it is admitted that the property levied on is necessary for the uses and working of the canal. Upon the matters alleged in the bill and answer several questions of much interest and importance have been raised by the respective parties and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, because, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would *be against* equity and un-

288 just to the other creditors of the corporation, and to the corporators who can own the stock, to suffer the property levied on to be sold under this *fi. fa.*, and consequently the circuit court was right in granting the injunction."

The Tide-Water Canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country

bordering on the Susquehanna river usually passes, in order to reach tide-water and the market. *The whole value of it to the stockholders consists in a practice of taking* toll on boats passing through it, according to the rates granted and prescribed in the act of Assembly which created the corporation. The property seized by the marshal *is of itself scarcely* of any value apart from the franchise of taking toll, with which it is connected, in the hands of the company, and if sold under this *fieri facias* without the franchise would bring scarcely anything, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser
289 under this execution. The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the States, it must be done under a statutory provision of the State, and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized, and consequently, *if the sale had taken place, the result would have been to destroy utterly the value the property owned by the company, while the creditor himself would most probably realize scarcely anything from these useless canal locks and lots adjoining them.*

The records and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise, and it would be against the principle of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the fran-
290 chise property which was essential for its useful existence. In this view of the subject, the court do not deem it proper to express any opinion as to the right of this creditor, *in some other form of judicial proceedings, to compel the sale of the whole property of the corporation, including the franchise, for the payment of the debt.* * *

If the appellant has the right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage and for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; and the circuit court was right in granting the injunction, and its decree is therefore affirmed."

In Chaffe *vs.* Ludeling, 27 A., 610, this court said: * * * The purchase of Ludeling and his associates conveyed them all the property of the corporation which was sold by the sheriff. It conveyed to them the privileges and franchises of the corporation, its power to operate the railroad, etc. The sheriff's sale made them owners of the road, its right of way, its property, its franchise, but
291 it did not and could not make them a corporation, for corpo-

rations are created only by special act of the Legislature, or by associations under the general law regulating the mode in which corporations are formed.

This sale conveyed to them the title to the right and property of the company, but, as regards these rights and that property, it made them joint owners thereof, and nothing else. In other words, the properly, rights, privileges, and franchises of the Vicksburg, Shreveport and Texas Railroad Company did not make them that company."

The United States courts, sitting in bankruptcy, have all the jurisdiction and powers of courts of equity. 9 Blatch., 189; 3 Bissell, 452; Deady, 433.

The title relied on by the plaintiff in this cause is derived from the sale in bankruptcy of the assets of the first Canal Street, City Park and Lake Railroad Company, and from mesne conveyances thereunder. The sale in bankruptcy was a *judicial* sale, in the strict sense, as contradistinguished from a sale under execution. The franchises of the company were specifically ordered to be sold, were sold in obedience to the orders, and the sale confirmed by a
292 judicial decree, from which an appeal might have been taken, as was done in Railroad Co. *vs.* James, 6 Wallace, 750, before referred to.

In Roser on Judicial Sales, a work whose text is sustained by ample citation of authorities, it is said:

SEC. 1. * * A judicial sale is, in contemplation of law, a sale made *pendente lite;* a sale in court, and *the court is the vendor.*

SEC. 2. It matters not, to the contrary, that it is made through the instrumentality of a master, commissioner, or other functionary appointed thereto by the court; it is not valid or binding, and confess no right to the property sought to be sold until confirmed by the court. By such confirmation it *is judicially made the act of the court,* and is, therefore, a *judicial* sale.

SEC. 3. In the language of the court in Bozza *vs.* Rowe, 30 Illinois, 198, "The master is the mere instrument of the court, acts under its directions, and is subject to its control; his acts under the decree, when regular, are considered those of the chancellor." * *

SEC. 1. If the sheriff be appointed by the court instead of
293 a master or commissioner to conduct the sale, as in Minnesota R. R. Co. *vs.* St. Paul, 2 Wallace, 609, he sells by virtue of the decree, and not by virtue of his office, and the sale is the sale of the court when confirmed.

SEC. 12. In a legal sense, the sale is made by the court itself in enforcement of its own orders and decrees, wherein is described the property to be sold. The person who conducts the same is merely the instrument or means used by the court to bring about such executory agreement as the court closes, & is satisfied, therewith by final act of confirmation, which makes the court the vendor. Such a sale is unlike a sheriff's sale in ordinary common law or statutory execution, which is a *ministerial,* and not a *judicial* act, and in making which the law regards the officer and not the court as the vendor.

SEC. 24. * * It is a general principle that appeals or error may

be taken only from judicial acts and decisions. Tested by this general principle, sales under orders and decrees by persons designated by the court are eminently judicial.

SEC. 25. Not only the decree or order itself, but also the order of confirmation, which — the very essence of the sale, may be re-
294 viewed in an appellate court. * * No appeal was taken from the decrees ordering and confirming the sale in question in this cause. None of the parties in interest were aggrieved by these decrees. The second Canal Street, City Park and Lake railroad, as a creditor of which Delamore asserts whatever rights he claims at all, was not in existence at the time these decrees were rendered, and Delamore does not pretend that he was a creditor of the first company, nor can it be pretended that any rights or interests of his were in any wise affected by the decrees in bankruptcy ordering and confirming the sale of the franchises of the first company.

The jurisdiction of the court, under whose decrees the sale in question was made, over the subject-matter and the parties is apparent. Whether the franchises of the bankrupt corporation were liable to be sold to satisfy the debts of the corporation and the liens and mortgages existing against it, was a question proper for judicial determination, and it was determined by the bankrupt court in the exercise of its lawful jurisdiction. *Non constat* that the mortgages referred to in the petition for the sale of the property and
295 franchises of the corporation were not such as would have lawfully subjected the franchises to seizure and sale under execution, in accordance with the views announced by this court in this case. The court has certainly no right to pronounce the nullity of the sale upon the assumption that they were *not* of that character.

We submit that it is not competent for this court on any ground other than a total defect of jurisdiction of the bankruptcy court to review at all the decrees of that court in the bankruptcy cause. For this court certainly can claim no appellate or revisory jurisdiction over that court. It is not competent, even for this court to review the judgments of courts over which it has revisory and appellate jurisdiction, except in a direct proceeding for the purpose. It cannot question collaterally the correctness of the decrees of courts subordinate to it, from which no appeal has been taken, or which have not been brought here for review by some other direct proceeding, provided by law for the purpose.

In Brosnahan *vs.* Turner, 16 L., 440, this court declared that where a judgment, execution, and sale are shown, the court will not inquire into the validity of the judgment.

269 In the Succession of Kaizer, 22 A., 175, this court said: The sale was made under a formal decree of the proper court and according to the provisions of law. It has been frequently held that under such sales the purchase will be protected.

In Gray *vs.* Brignardello, 1 Wallace, 634, the Supreme Court of the United States say: "It is a well-settled principle of law that the decree or judgment of a court which has no jurisdiction of the per-

son and subject-matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law, or misjudged the facts, but its adjudication, when made, *concludes all the world* until set aside by the proper appellate tribunal. And although the judgment or decree may be reversed, yet all rights acquired at a judicial sale, while the decree of judgment were in full force, and which they authorized, will be protected. *It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale.* With the errors of the court
297 he has no concern. These principles have so often received the sanction of the court that it would not have been deemed necessary to reaffirm them, had not the extent of the doctrine been questioned at the bar."

In Florentine *vs.* Barton, 2 Wallace, 216, the same court said: * * "In making the order of sale the court are presumed to have judged every question necessary to justify such order or decree. * * The court having the right to decide every question which occurs in a cause, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court. The purchaser under such sale is not bound to look further back that the order of the court, or to inquire as to its mistakes. * * A difficult doctrine would * * render titles under judicial sales worthless, and a 'mere trap for the unwary.' These propositions will be found argued at length and fully decided by us in Grignon's Lessee *vs.* Astor, 2 How., 319. Any further argument in vindication of them would be superfluous."

In Grignon's Lessee *vs.* Astor, referred to in the opinion in the foregoing case, the court said: * * The granting the license to sell is an *adjudication upon all the facts necessary to give juris-*
298 *diction*, and whether they existed or not is wholly immaterial if no appeal is taken. The rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive upon all whom it concerns. The record is absolute verity to contradict where there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtain it. 6 Pet., 729. A purchaser is not bound to look beyond the decree if there is error in it to the most palpable kind; if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error. * *

In Peck *vs.* James, 7 Howard, 624, the Supreme Court of the United States, referring to the jurisdiction of a State court over an attachment suit pending before it, said: * * "It had full and
299 complete jurisdiction over the parties and the subject-matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal, not deriving its authority from the same

sovereign, and as regards the district court a foreign forum every way its equal. The district court had no supervisory power over it." * * *

It is a doctrine of law, too long established to require citation of authorities, that where a court has jurisdiction it has a right to *decide* every question which occurs in the cause, and that whether its decision be correct or otherwise, its *judgment*, until reversed, is regarded *as binding in every* other court." * *

We earnestly ask your honors to compare so much of your opinion as formally declares the nullity of the decrees of the bankrupt court in the bankruptcy of the first Canal Street, City Park and Lake Railroad Company, and of the title derived under those decrees, with the doctrines laid down by the Supreme Court of the United States in Voorhees *vs.* Bank of the United States, 10 Peters, 474.

"There is no principle of law," said the Court in that case,
300 "better settled that that every act of a court [of] competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of the proceedings, from the introduction to their completion, as to their adjudication, that the plaintiff had a right of action." * * *

A judgment or execution, irreversible by a superior court, cannot be declared a nullity by any authority of law if it had been rendered by a court of competent jurisdiction of the parties and the subject-matter; with authority to use the process it has issued, it must remain the only test of the respective rights of the parties to it. If the validity of a sale under its process can be questioned for any irregularity preceding the judgment, it deprives it of all power of regulating its own practice or mode of proceeding in the progress of a cause to judgment. If after its rendition it is declared void for any matter which can be assigned for error only on a writ of error or on appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited
301 by express statute law from ever reversing.

If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court, after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or process would not be exempted. * * * The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matters adjudicated or purporting to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between parties to a suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment

execution. *It would be a well-merited reproach to our jurispru-*
302 *dence if an innocent purchaser, who had paid his money on the faith of an order of court, should not have the same protection as the party who derived the benefit accruing from it.* * * This great rule, established for the protection of purchasers on the faith of judicial process, will be utterly prostrated; encouragement will be given to defendants in judgment, their heirs and priores, to take advantage of the security into which honest purchasers have been lulled, if any judicial proceeding which could stand the test of a writ of error or appeal, or had become irreversible directly, could be divided collaterally. * * In Wheaton *vs.* Sexton, 4 Wheaton, 506, the case turned on the validity of the sale of real estate by the marshal of this district, by virtue of an execution, in which the language of the court is: "The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal." * * In Tolmi *vs.* Thompson there had been a sale under an order of the orphan court of this district, which had *been confirmed* by them, and a deed made to the purchaser, the validity of which was questioned on objections similar to these now under consideration.

303 The court say: "These proceedings were brought before the court collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is that when proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are avoidable only. The errors and irregularities, if any exist, are to be corrected *by some direct proceeding, either before the same court, to set them aside, or in an appellate court.*" * * *

The purchaser is not bound to look beyond the decree when executed by conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings, nor to look further back than the order of court. * * *

"When a court has jurisdiction, it has a right to decide every question that arises in the cause; and whether its decision be correct or not, its judgment, until reversed, is regarded as binding in
304 every other court." Elliot *vs.* Piervale, 1 Peters, 240.

The principle which must govern this and all other sales by judicial process are general ones, adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are *the favorites of the law in every court and by every code.*"

Finally, in this connection, we respectfully ask the court to compare so much of the opinion in this case as pronounces the nullity of the decrees of the bankrupt court in the bankruptcy of the first Canal Street, City Park and Lake Railroad Company and of the title derived thereunder to property specifically described in the decrees, and in the act of conveyance made by order and in con-

formity to the directions of the court, with the doctrines laid down by this court itself quite recently in Bledsoe *vs.* Erwin, 33 A., 620, where it is said "The United States court was vested with a jurisdiction, both at law and in equity over all the matters involved in the transferred suit. It was *competent to determine its jurisdiction over the cause,* and if it assumed jurisdiction, it was competent to pass upon the issues which it presented. It has done so. * * *
305 This court has no power to review the action and test the correctness of the action of the circuit court. It must and does presume that that court has made a sound appreciation of the facts and a correct application of the laws. Its action is a perpetual bar."

We respectfully submit that upon the foregoing authorities it is manifest that there is error in so much of the opinion of the court in this case as pronounces the nullity of the decrees of the United States district court in the bankruptcy of the first Canal Street, City Park and Lake R. R. Company, in so far as they relate to the sale of the franchises of the company and the nullity of the title derived from said sale; and that the delays for review of the decrees of the bankrupt court by any direct proceeding for this purpose having expired, and no court having the right to review these decrees collaterally, the title derived under said decrees cannot now be questioned in any court.

We have shown before that all the corporate franchises of the company were derived, not from any grant by the city of New Orleans, but from the State, and that they were derived from the State, not by an*d* special grant, but under general laws, equally
306 applicable to all, under which any six or more persons may constistute themselves a body corporate for the purpose of constructing, owning, and operating a railroad. We have already shown, as declared and defined by its constitutions and laws, has been against the grant by the State of particular franchises to particular corporations by special legislative action. The constitutions of 1845 and 1864 expressly forbid any such legislative action, and the constitution of 1879 also expressly forbids it. Art. 46 of that constitution declares: "The General Assembly shall pass any local or special law on the following specified objects: * * creating corporations, or amending, renewing, extending, or explaining the charter thereof; provided, this shall not apply to the corporation of the city of New Orleans or to organization of levee districts and parishes.

Granting to any corporation, association, or individual any special or exclusive privilege or immunity."

How can it be consistently contended that while it is the declared public policy of the State that all franchises for building and operating railroads, etc., shall be required under general laws equally applicable to all, such rights, when so acquired cannot be trans-
307 ferred without special legislative sanction, although the original acquisition of such rights by special legislative action is expressly forbidden?

But the right, the transfer of which is really in question here, is

rather the right of way through certain streets of the city of New Orleans granted by the city council, than the right to own and operate a railroad which can be acquired — who choose to constitute themselves a body corporate for such purpose under the general laws of the State.

The relation between the grantor and grantee of such a right of way is not the relation which exists between the State or sovereign and a corporate body of its creation. It is simply a *contract relation between two bodies politic* existing under the laws of the common sovereign, the contract itself being one which, by these laws, they are expressly authorized to enter into. Even in the case of a grant by the sovereign, the doctrine is laid down, in Dartmouth College *vs.* Woodward, 14 Wheat., 418, that "a grant is a contract, and implies an obligation not to reassert the right granted. And a gift of franchises and powers, as distinguished from a gift of property, is within the rule. Whether there was any consideration for it
308 moving from the corporation to the grantor of the franchise is immaterial. A gift of a franchise completely executed and accepted by the grantees becomes irrevocable. But if a consideration were necessary, it may be found in the implied stipulations on the part of the grantees and in the acts of those *who deal with them on the faith of it.*"

In the present case the first Canal Street, City Park and Lake Railroad Company was dealt with and incurred indebtedness to third parties on the faith of the consent of the city to the construction of the road through certain streets. The road was constructed on the faith of the grant, and the company thereafter became so much embarrassed that it was compelled to make a surrender in bankruptcy of all its assets, including the road and the right of franchises to use and operate it for the purpose for which it was constructed; and thereafter the road, with all its appurtenant rights and franchises, was sold by order of the bankrupt court to Handy, partly for cash and partly on credit, with reservation of vendor's lien and privilege on the property sold, and thereafter the road, with the appurtenant rights and franchises, was by Handy trans-
309 ferred to *transferred to* the second Canal Street, City Park and Lake Railroad Company, and that company assumed the payment of the credit portion of the price so secured by vendor's lien and privilege; and thereafter, on the enforcement of this vendor's lien and privilege, the road, with appurtenant rights and privileges, was sold under execution to Schwartz & Brother, without objection on the part of Handy, the second Canal Street, City Park and Lake Railroad Company, Delamore, or any other creditor of Handy or of the company.

It is ordered that if there was an existing title to the road, and its attendant franchises encumbered either by mortgage or vendor's lien and privilege, that it was not in the power of the city by a new grant of similar franchises to the new company, or of the new company accepting such grant *to oust the mortgage or vendor's lien and privilege which had attached to the rights and franchises under the original and still existing grant*, and that a sale of such rights and fran-

chises under execution to enforce such vendor's lien and privilege would pass a valid title thereto to the purchaser, and that the setting up the new grant of the same rights and franchises, as was
310 done by Delamore in seizing and offering it for sale, is an infringement of the prior grant, which ought to be restrained by injunction.

We contend that the consent of the city was not necessary to the transfer of the rights of the grantees under the original grant. Whether it was or not, was a question at issue between the parties to this suit. If it had been, the plaintiff, The New Orleans, Spanish Fort and Lake Railroad Company, would have shown that the rights asserted by it have been expressly recognized and sanctioned by the city council of New Orleans in ordinance 5070 A. S., of May 21, 1870, and in ordinance 6275 A. S., of December 31, 1879, which is as follows:

Be it ordained, etc., That whereas the New Orleans, Spanish Fort and Lake Railroad Company, successor by purchase of the rights, franchises, grants, and privileges of the late Canal-Street, City Park and Lake Railroad Company, has become the owner of the certain portion of ground situated in the square bounded by Bienville, Bernadotte, Conti, and St. Patrick streets * * and whereas the curve of the tracks of railroad at the corner of Bienville and Bernadotte
311 streets is abrupt and difficult, the said company is hereby authorized and empowered to alter and change the said tracks and bed of said road so that the same shall run across the portion of ground above described, and to make, under the direction and approval of the city surveyor, such alterations in the grade of said streets as may be necessary to effect such change; it being, however, understood that nothing shall be done by virtue of this ordinance which shall in anywise interfere with the drainage or free use by the public of said streets.

Be it further ordered, etc., that said company is hereby authorized to remove their track on St. Patrick street, and to lay a double track on Bernadotte, from Bienville street to Orleans avenue, provided said railroad company shall keep said Bernadotte street, on which a double track is to be constructed, in good repair from curb to curb; and provided further, that the rails shall be laid in such a manner as to allow free passage of vehicles along and across the rails on Bernadotte street, from Bienville street to Orleans avenue, the work to be done under the supervision of the city surveyor and to the satisfaction of the administrator of commerce and administrator of improvements.

312 Adopted by the council of the city of New Orleans, December 30, 1879.

Yeas—Behan, Cheralley, Glynn, Isaacson, Marks.

(Signed) I. W. PATTON, *Mayor.*

A true copy.

(Signed) R. C. WOOD, *Secretary.*

While the matters directly at issue between the parties to this liti-

gation are of comparatively little importance, the court, in its opinion, having collaterally questioned the validity of titles acquired under the decrees of another court, upon the faith of which under professional advice hundreds of thousand of dollars have been invested, the undersigned have considered it incumbent upon them to present at length the reasons which, in their judgment, should induce the court to grant a rehearing of the cause. They respectfully submit that they have shown upon principle and authority that there is error in the opinion as delivered, and that the rehearing, for which they appeal, should be granted.

(Signed) MOTT & KELLY,
Of Counsel.

313 *Brief on Application for a Rehearing. Filed February* 1, 1882.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY
vs.
GEORGE DELAMORE. } No. 8035.

George Delamore, a judgment creditor of the Canal Street, City Park and Lake Railroad Company, seized the right of way granted by the city of New Orleans to said company under ordinance 4523. The ownership of this right of way is the sole matter in controversy.

The seizing creditor does not even pretend that he has a right to, and can or does seize any right of way or franchise that that granted by ordinance 4523; he questions the title to none other; nor does any one else contest the title to any other, so that no question does or can properly arise in this controversy as to the title to any other franchise.

It is true that the present plaintiff, in setting up title to this franchise, recites, with circumstance, title to an antecedent and similar franchise.

The plaintiff in this suit recites his title to the former right of way, simply to give it standing in court, and to show that the
314 rights of way under ordinance 4523 were given solely to confirm and by cumulation remove all question of former rights.

The provision in the second Canal Street, City Park and Lake Railroad Company was incorporated Jan'y 31st, 1878, wherein it is recited that "the value of the property and franchises of the late Canal Street, City Park and Lake Railroad Company, now belonging to the parties to this act, and which are to become the property of the corporation formed by this act," and the grant of parallel and similar franchises to the company in name, May 23d, 1878, by ordinance 4523, seems to leave no doubt as to the interest of all parties in accord with the above averment.

We respectfully submit, then, that the court went outside the record when it decided that the bankrupt sale and the subsequent transfers were nullities: first, because the issue is raised and asked by no party to the suit; because it is unnecessary to a proper decision of the real issue in the case. The position of the plaintiff herein is simply this: It is in peaceable and unquestioned possession and en-

joyment of certain rights of way confirmed by ordinance 4523, of May, 1878.

315 The presumption of law is necessarily in favor of the legality of such unquestioned rights, for the court cannot and will not suppose the public authority derelict in its duty to prevent the illegal uses of valuable rights and franchises.

The court ought to presume that the proceedings had in the United States bankrupt court were regular; that when those proceedings showed that, under its orders, properly consisting of road-bed, rolling-stock, right of way, and franchises, were ordered to be sold, that a surrender of such right of way and franchises had been made, and that they were lawfully in the custody of the court. To presume otherwise is to presume, in the absence of evidence, that that court acted without evidence or legal authority, and to set aside its decrees without even the formality of an attack.

But there is sufficient evidence in the record that the franchise and right of way were lawfully in the custody of the bankrupt court.

The petition addressed, according to the forms of the United States bankrupt act of the district court in charge, shows that the sale was applied for to satisfy, amongst others, certain mortgage creditors. (Record, p. —.)

Will your honors presume that these *were not* such mortgages as are sanctioned by the laws of the State?

316 Will you not rather *maintain* the authority of that court and its decree (even if you might question), not questioning that its orders were based upon proper formdations, both in law and fact?

Now, then, if the rights under ordinance 4523 are simply cumulative and conformatory, it follows that they inseparably attach to, and form part and parcel of, the unquestioned rights of the company possessions, and that the court must recognize them as such.

II. Under section 692 the court concede that railroad companies may borrow money on their property and franchise to construct and repair their roads. In the case at bar the indebtedness was incurred for the purchase price of the road and franchises.

Here was a road incapacit-ed from meeting its obligations, insufficiently appointed, partially built only; it is sold at law, and the purchase price is represented in part by notes secured by mortgage; if not so sold, it is doomed to evident and no distant annihilation; its purchase under such circumstances, and subsequent successful operation by virtue of such sale, is, if not in terms, at least, and fairly in intendment, the construction of a road which, by law, could be secured by "mortgage upon the franchises and all the property of the company."

317 It was to obtain payment of one of these very notes that the foreclosure and sale was made. Act No. 13 of 1880 so enlarged section 692 of the Revised Statutes as to include the purchase of railroad or the franchises and right of way thereof; thus to the latter, legalizing the purchase, even if the transaction be looked upon as the sale of a complete road.

III. Concede that under the law the sale of a franchise cannot be made without the assent of the grantor, we say that the principle in its utmost extent does not touch the question at law.

The rights granted and acquired under ordinance 4523 are not in any proper sense a franchise which only emanates from the sovereign or with its consent.

The distinction between a franchise and a mere license or permit is clearly settled by the leading authority of Chicago City Railroad Company *vs.* The People *ex rel.*, 73 Ill., 548.

"The grant or license given by the ordinance comes within no definition of a franchise. Besides, a municipal body, it is understood, possesses no power to confer a franchise."

It is apparent, therefore, that the franchise of the company and the right of way granted by the city ordinance are separate and distinct rights; the former derived from the sovereign,
318 intransmissible without his consent, the other a simple license, a right of way, the subject of transfer and execution unless prohibited by the grant itself; its results, therefore, that the original sale of this right of way, if it were involved in the case, is legal, and that the cumulative and conformatory grant or license passed with it to its present owners.

Under this view, the authorities cited have no application to the instant case.

The vice of the whole argument, in opinion of court, we humbly submit, consists in the assumption that the license to the plaintiff to construct its road on the streets designated in the ordinance is a franchise, the assumption being without authority. See Davis *vs.* The Mayor, 4 Kernan, 506.

It is but the authority granted by the city to the company to run its road through the designated streets, as required by the statute of the State. It is the permit which the general statute requires should be obtained of all cities through which it is proposed to run railroads, the object being to maintain what is known as the police power of cities, as contradistinguished from the right to grant a franchise exclusively a sovereign right.

319 If the distinction is kept in view, there is no difficulty in maintaining, as we think the court should, that the permit under ordinance 4532 passed to the present plaintiff by sale, with the assent of the city, who, in any event, is the only party to complain, even if it had not.

We respectfully submit that the rehearing should be granted, and that the plaintiffs' injunction should be made perpetual.

(Signed) BREAUX & HALL,
CHAS. S. RICE,
Of Counsel for Plaintiff.

January, 1882.

Syllabus.

1. Plaintiff's title under bankrupt proceedings is not drawn into controversy; its possession thereunder is not the question.

The court should not, therefore, have raised and passed upon the issue not presented or suggested by the pleadings.

2d. If it does, the presumption is that the bankrupt court rightfully disposed of the question of the transfer of franchises as under the law.

3d. A company authorized by the sovereign to borrow money to build and repair its road and hypothecate its road and franchises, may hypothecate them to pay for purchase price of a built road, which — but the equivalent act. This was done here,
320 and it is to pay credit part of the purchase price that foreclosure was made.

Rev. Statutes, 692, Act. 13, 1880, p. 19.

4th. Ordinance 4523, and all similar ordinances are only permits, not to be confounded with franchises. If the grantee assigns them, the grantor, the city, is the only party that may complain.

Chicago City Railway Co., 73 Ill., 548.

Davis *vs.* The Mayor, 4 Kernan, 506.

Order Assigning Cause for Argument.

Extract from the Minutes.

MONDAY, *March 6th*, 1882.

The court was duly opened, pursuant to adjournment.

Present: their honors Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY *vs.* GEORGE DELAMORE. } No. 8035.

It is ordered by the court that this case be assigned for Saturday, March 11th, 1882, for oral argument in support of the petition for rehearing.

321 *Cause Submitted.*

Extract from the Minutes.

SATURDAY, *March 11th*, 1882.

The court was duly opened. Present: Their hon's, Edward Bermudez, chief justice, and Felix Poche, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY *vs.* GEORGE DELAMORE. } No. 8035.

This case was called for trial, and having heard argument from Henry B. Kelley, Esq., of counsel for plaintiff and appellant, and from William S. Benedict, Esq., of counsel for defendant and appel*lant* herein.

The court took said case under advisement upon the briefs and papers now on file.

Order Refusing Rehearing.

Extract from the Minutes.

MONDAY, *May* 15, 1882.

The court was duly opened pursuant to adjournment.

322 Present: Their honors, Edward Bermudez, chief justice, and Felix P. Poche, Robert B. Todd, Charles E. Fenner, associate justices.

Absent: William M. Levy, associate justice.

NEW ORLEANS, SPANISH FORT AND LAKE RAILROAD COMPANY *vs.* GEORGE DELAMORE. } No. 8035.

It is ordered that the rehearing applied for in this case be refused.

Mr. Justice Levy concurs in refusing the rehearing.

(Mr. Justice Todd dissents, and thinks a rehearing should be granted.)

Writ of Error. Filed May 15th, 1882.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, holding sessions at New Orleans, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is [in] the said supreme court of the State of Louisiana, holding sessions at New Orleans, before you, or
323 some of you, being the highest court of law or equity of the said State in which the decision could be had in the said suit between the New Orleans, Spanish Fort and Lake Railroad Company and George Delamore and J. R. Aclee Gauthreaux, civil sheriff of the parish of Orleans, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said New Orleans, Spanish Fort and Lake Railroad Company, as by their complaint appears. We being willing
324 that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same, at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 15th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL] (Signed) F. A. WOOLFLEY,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
(Signed) E. BERMUDEZ,
Chief Justice Supreme Court of Louisiana.

325 Endorsed: No. 8035. The New Orleans, Spanish Fort and Lake Railroad Company, plaintiff, *versus* George Delamore & *al.* Copy of a writ of error lodged in the clerk's office of the supreme court of the State of Louisiona, holding sessions in New Orleans. Copy in pursuance of the statute in such cases made and provided this 15th day of May, one thousand eight hundred and eighty-two. Robert Mott, attorney of plaintiff in error. Filed 15 May, 1882. Signed T. McC. Hyman, d'y clerk.

Motion to Deny Writ. Filed May 16th, 1882.

N. O., SPANISH FORT & LAKE R. R. Co.
vs.
GEORGE DELAMORE. } No. 8035.

On application for writ of error defendant humbly submit—
1st. That no Federal question was involved in this controversy.
2d. That no decision involving such question has been rendered.
That in consequence no writ lies in error to U. S. Supreme Court.

326 It is therefore prayed that same be denied.
(Signed) W. S. BENEDICT,
Att'y for Def't.

Authorities to Support Application. Filed May 17th, 1882.

The N. O., Spanish Fort and Lake R. R. Co., averring that all the rights of way, powers, and franchises described in city ordinance No. 4523 had been previously granted under certain prior ordinances to another company, and that the Spanish Fort Company *was the owner* of all the rights of way, franchises, etc., so granted by said prior ordinaces, by title thereto derived under a sale of them, made *under a certain decree of the* district court of the United States for the dis-

trict of Lousiana, sitting in bankruptcy, in the bankruptcy of the company to which they were originally granted, and averring that the grant of identically or substantially the same rights of way and franchises to another company by ordinance 4523 was in conflict with their prior title, and calculated to throw a cloud upon it, applied for and obtained an injunction restraining Delamore from advertising and offering them for sale under his execution.

With reference to this claim of title under the decree of the
327 Federal court, this court has decided "That the right of way granted by the city to the first company was not transferred to its creditors and to Handy at the bankruptcy sale. Handy *did not* acquire, *did not* encumber, and *did not* transfer it to the second corporation, which, therefore, *never owned* it. * * * As the first right of way was not surrendered, *was not sold, was not* transferred to the second company, it *was not sold* to Schwartz and Brothers, who, therefore, did not acquire it, and *did not sell* it to the plaintiff." * * *

The claim of the title set up by the plaintiff company under decree of the Federal court, and mesne conveyances, has thus been *expressly denied* by the supreme court of the State upon the sole ground that the decree of the Federal court was and is void and invalid for the purposes for which it is set up and relied upon by the plaintiff company.

By the act of the 5th of February, 1867, § 2, 14 St. at L., 386, it is enacted that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where *any title, right, privilege*, or immunity is claimed under
328 the Constitution, or any treaty, or *statute* of, or commission held, or *authority* exercised, under such Constitution, treaty, statute, commission, or authority exercised, under the United States, and the decision is against the *title, right, privilege*, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error," etc.

In *Clements vs.* Berry, XI How., 408, it was held that the *denial by the State* court of a lien claimed as resulting from a judgment *of a Federal* court was sufficient to support a writ of error to the Supreme Court of the United States.

The court said: "The jurisdiction of this court is the first question to be considered. The plaintiff sets up a lien on certain personal property under a judgment rendered by the circuit court of the United States held for the middle district of Tennessee.

The defendant asserts a lien under a deed of trust for the property from Charles F. Berry, and the supreme court of Tennessee held that the lien of the deed was paramount to that of the judgment.
329 This brings the case within the twenty-fifth section, *as the decision was against the right asserted* by Clements *under the authority* of the United States."

In Lyttle *vs.* Arkansas, 22 How., 202, the Supreme Court of the United States said the first question presented on the record is whether this court has jurisdiction to examine and revise the de-

cisions of the supreme court of Arkansas by writ of error under the 25 section of the judiciary act. * * *

The cause was fully heard on its merits below, and the claim of Cloyes rejected on the ground that he obtained his entry by fraud in fact and fraud in law, and the question is, can we take jurisdiction and reform this general decree?

It rejected the title of Cloyes, and in our opinion it is not material whether the invalidity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. *The fact that the title was rejected* in this court authorizes this court to re-examine the decree. 14 Pet., 360.

The decision of the supreme court of Arkansas *drew in question an authority exercised under the United States, to wit*, that of admit-
330 ting Cloyes to make his entry, and the decision was *against its validity, and over them his title*, and is therefore subject to be re-examined and reversed or reaffirmed in this court." * * *

In *Crapo* vs. *Kelly*, 16 Wallace, certain rights were claimed in a proceeding in the courts of the State of New York as resulting from certain proceedings in a court of the State of Massachusetts, *under* the *insolvent* laws of that State, and the decision of the State court of New York was *against* the effect contended for by the party claiming the benefit of the insolvent proceedings in the State court of Massachusetts, and the Supreme Court of the United States *held* that for that reason a writ of error would lie from it to the State court of New York.

In *Dupasseur* vs. *Rochereau*, 21 Wallace, 130, which was a writ of error to the supreme court of Louisiana, the Supreme Court of the United States said:

Where a State court refuses to give effect to a judgment of a court of the United States rendered upon the point of dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to the court for revision.

331 The case would be one in which *a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction*, and hence would be within the judicial power of the United States, as defined by the Constitution, and it is clearly within the within chart of the appellate power given to this court, over cases arising in and decided by the State courts.

The refusal of the courts of one State to give effect to the decision of the courts of another State is an infringement of a differet article of the Constitution, to wit, the first section of article four; and the right to bring such a case before us by writ of error under the 25th section of the January act or the act of 1867 is based on the refusal of the State court to give validity and effect to the right claimed under that article or section.

In either case, therefore, whether the validity or due effect of a judgment of a State court, or that of a judgment of a *United States*

332 *United*, is disallowed by a State court, the Constitution and *and* laws furnish redress by a final appeal to this court.

In the present case the plaintiff company *claims* title to certain franchises and rights of way under purchase at a sale of the specific rights and franchises specifically ordered to be made by the district court of the United States for the district of Louisiana, sitting in bankruptcy in the bankruptcy of the company, to which the rights and franchises in question were originally conceded.

The order for the sale was not only made by the bankrupt court, but the sale was made in obedience to the order, was reported to the Federal court, and confirmed by the Federal court.

This court has decided in this case; thus *no sale* was made,

In O'Brien *vs.* Fula, 92 U. S., the Supreme Court of the United States *held* that a decision of a State court adverse to the power of a bankrupt court to *made* an order under which property in suit was sold, presented a Federal question, or that a writ of error from the Supreme Court of the United States to the State court would be to review such decision.

(Signed) MOTT, KELLY AND SAUNDERS,
Of Counsel.

333 *Bond for Writ of Error. Filed May 19th*, 1882.

Know all men by these presents, That we, New Orleans, Spanish Fort and Lake Railroad Company and James M. Seixas as sureties, are held and firmly bound unto George Delamore and J. R. Alcee Gauthreaux, civil sheriff of the parish of Orleans, in the full and just sum of ten thousand dollars, to be paid to the said George Delamore & J. R. Alcee Gauthreaux, sheriff, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 15th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas, lately at a supreme court of the State of Louisiana, holding sessions at New Orleans, in a suit depending in said supreme court, wherein the New Orleans, Spanish Fort and Lake Railroad Company was plaintiff and George Delamore was defendant, judgment was rendered against the plaintiff and in favor of the
334 said defendant, and the New Orleans, Spanish Fort and Lake Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said George Delamore & J. R. Alcee Gauthraux, civil sheriff, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such, that if the said New Orleans, Spanish Fort and Lake Railroad Company shall prosecute their suit to effect, and answer all damages and cost if they

fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

N. O., S. FORT & LAKE R. R. CO.
(Signed) JOHN SCOTT, "*President.*" [L. S.]
J. M. SEIXAS.

Sealed and delivered in the presence of—
(Signed) ROBERT MOTT.

Approved.
(Signed) E. BERMUDEZ,
Chief Justice S. C. of La.

UNITED STATES OF AMERICA, }
District of Louisiana, } *ss:*

335 & 336 Personally appeared James M. Seixas, who, being duly sworn, deposes and says: That he is the surety on the within bond; that he resides in the city of New Orleans, and is worth the full sum of ten thousand dollars over and above his debts and liabilities and property exempt from execution.

(Signed) J. M. SEIXAS.

Subscribed and sworn before me, this 18th day of May, 1882.
[SEAL.] (Signed.) CHAS. G. ANDRY,
Notary Public for the Parish of Orleans.

Endorsed: No. 8035. Supreme court of Louisiana. New Orleans, Spanish Fort & Lake Railroad Co. *vs.* George Delamoer *et al.*, def't in error. Bond for writ of error. Filed 19th May, 1882. Signed T. McC. Hyman, d'y clerk.

Clerk's Certificate.

I, George W. Dupré, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do
337 hereby certify that the foregoing three hundred and thirty-five pages contain a true copy of the record and of all the proceedings in the cause wherein the New Orleans Spanish Fort and Lake Railroad Company was plaintiff and George Delamore & *al.* were defendants, lately depending in said supreme court of the State of Louisiana, as the same remain on the file therein under the number 8035 on the docket thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this twenty-fifth day of July, anno Domini, one thousand eight hundred and eighty-two, and in the one hundred and sixth year of the Independence of the United States of America.

[SEAL.] GEORGE W. DUPRÉ, *Clerk.*

338 *Certificate of the Chief Justice.*

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify that George W. Dupré is clerk of the supreme court of the State of Louisiana, holding sessions at

the city of New Orleans; that the signature of George W. Dupré to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of N. O., this twenty-fifth day of July, one thousand eight hundred and eighty-two, and in the one hundred and sixth year of the Independence of the United States of America.

[SEAL.] E. BERMUDEZ,
Chief Justice.

339 THE UNITED STATES OF AMERICA:

The President of the United States to George Delamore, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein the New Orleans, Spanish Fort and Lake Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said New Orleans, Spanish Fort and Lake Railroad Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] E. BERMUDEZ,
Chief Justice S. C. La.

340 [Endorsed:] —— court. No. —. The New Orleans, Spanish Fort & Lake Railroad Company, pl'tff in error, *vs.* George Delamore & *al.*, def't in error. Citation.

Marshal's Return.

Received May 10, 1882, by the U. S. marshal, and on May 29th, 1882, I served a true copy of the within writ of error on George Delamore, defendant in error herein, by handing the same to him in person in the city of New Orleans.

E. S. CURRY,
Dy U. S. Marshal for Eastern Dist. of La.

Personally appeared before me, E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true copy of the within writ of error on the defendant in error herein named, as set forth in his official return hereon.

E. S. CURRY,
Dy U. S. Marshal for Eastern Dist. of La.

Subscribed and sworn before me, June 20th, 1882.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Commissioner's fee for jurat, fifty cents, paid by plaintiff in error.

F. A. WOOLFLEY,
Commissioner.

Marshal's costs for serving copy of this citation in error, $2.00, paid by plaintiff in error on 21st day of June, 1882.

J. R. G. PITKIN, *Marshal.*

341 THE UNITED STATES OF AMERICA:

The President of the United States to J. R. Alcee Gauthereaux, civil sheriff of the parish of Orleans, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein State of Louisiana, holding sessions at New Orleans, wherein the New Orleans, Spanish Fort and Lake Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said New Orleans, Spanish Fort and Lake R. R. Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of May, in the year of our Lord one thousand eight hundred eighty-two.

[SEAL.] E. BERMUDEZ,
Chief Justice S. C. La.

342 [Endorsed:] Supreme court of La. R. No. —. The N. O., Spanish Fort & Lake R. R. Co., plaintiff in error, *vs.* George Delamore *et als.*, def't in error. Citation.

Marshal's Return.

Received May 19th, 1882, by the U. S. marshal, and on June 3d, 1882, I received a true copy of the within writ of error on J. R. Alcee Gauthereaux, civil sheriff of the parish of Orleans and defendant in error herein, by handing the same to Gus. A. Breaux, Esq., attorney of record for the said J. R. Alcee Gauthereaux in person, in the city of New Orleans, the said attorney accepting service of the same for said Gauthereaux, who was absent from the district of Louisiana at the time of said service.

E. S. CURRY,
Dy U. S. Marshal, Eastern D'st of La.

Personally appeared before me E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and

makes oath that he sent a true copy of the within writ of error on the defendant in error herein named, as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal, Eastern D's't of La.

Subscribed and sworn before me, June 20th, 1882.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Marshal's costs for service of this citation in error, paid by plaintiff in error June 21, '82. $2.00.

J. R. G. PITKIN, *Marshal.*
By W. W. JACKSON, *D'y M'sh.*

Commissioner's fee for jurat, fifty cents, paid by plaintiff in error.

F. A. WOOLFLEY,
Commissioner.

343 THE UNITED STATES OF AMERICA:

The President of the United States to the civil sheriff of the parish of Orleans, successor of the civil sheriff of the parish of Orleans under the constitution of 1868, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, holding sessions at New Orleans, wherein the New Orleans, Spanish Fort, and Lake Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said New Orleans, Spanish Fort & Lake Railroad Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] E. BERMUDEZ,
Chief Justice S. C. La.

344 [Endorsed:] Supreme court of La. R.. No.—. The New Orleans, Spanish Fort & Lake Railroad Company, pl'ff in error, *vs.* George Delamore & *al.*, def't in error. Citation.

Marshal's Return.

Received May 19, 1882, by the U. S. marshal, and on June 10th 1882, I served a true copy of the within writ of error on the defendant in error herein named, to wit, the civil sheriff of the parish of Orleans, successor of the civil sheriff of the parish of Orleans under the constitution of 1868, by handing the same to

Thomas Duffy, Esq., civil sheriff of the parish of Orleans, in person, in the city of New Orleans.

E. S. CURRY,
D'y U. S. Marshal for Eastern Dist. of La.

Personally appeared before me, E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true copy of the within writ of error on the defendant in error herein named, as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal for Eastern D'st. La.

Subscribed and sworn before me, June 20th, 1882.

F. A. WOOLFLEY,
Commissioner United States Circuit Court
Eastern District of Louisiana.

Commissioner's fee for jurat, fifty cents, paid by plaintiff in error.

F. A. WOOLFLEY,
Commissioner.

Marshal's costs for serving copy of this citation in error, $\$2_{\frac{00}{100}}$, paid by plaintiff in error this 21st June, 1882.

J. R. G. PITKIN, *Marshal,*
By W. W. JACKSON, *D'y M'sh'l.*

Endorsed on cover: Louisiana supreme court. No. 252. The New Orleans, Spanish Fort and Lake Railroad Company, plaintiff in error, *vs.* George Delamore, J. R. Alcie Ganthreaux, civil sheriff of the parish of Orleans, and the civil sheriff of the parish of Orleans, successor of the parish of Orleans under the constitution of 1868. Filed 4 August, 1882.